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VOLUME I OF II VOLUMES

Supreme Court, U.S.

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Supreme Court of the United States

OCTOBER TERM, 1970

NO. 676

70-27

ROBERT MITCHUM, d/b/a THE BOOK MART,
APPELLANT,

VS.

CLINTON E. FOSTER, As Prosecuting Attorney of
Bay County, Florida; M. J. "DOC" DAFFIN, As
Sheriff of Bay County, Florida; and THE
HONORABLE W. L. FITZPATRICK, As Circuit
Judge of the Fourteenth Judicial Circuit in and
for Bay County, Florida,

APPEEES.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

APPEAL FILED AUGUST 21, 1970

PERMANENT JURISDICTION NOTED MAY 3, 1971

Supreme Court of the United States

OCTOBER TERM, 1970

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VOLUME I OF II VOLUMES

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[fol. 1]

CIVIL DOCKET
UNITED STATES DISTRICT COURT

PC92224

3 Three Judge Court
WILLIAM STIMPSON SCOTT & ARROW

Jury Demand date:

C. Stone, Ed., 1993 Ed.

TITLE OF CASE		ATTORNEYS			
ROBERT MITCHELL, G/A THE ROCK GROUP.		For Plaintiff: (1) Paul Shinn, Jr. P. O. Box 641 Pensacola, Florida, 32503 3. In fees 2 copies to all			
vs. CLINTON F. FOSTER, as Prosecution Attorney of Bay County, Florida, and R. J. "DOC" HARTIN, as Sheriff of Bay County, Florida		For Defendant: Clinton F. Foster (1) Ray Johnson (2) Raymond Early (1) (1) 1410 Rock Ave., Panama City, 32405 (2) 406 Magnolia Ave., Panama City, " 32401 (3) Attorney General's Office Capitol Building, Tallahassee (4) Jim J. Merrill 201 E. First St. Panama, Fla. For Foster & P			
DEFENDERS' RECORD	CLASS	DATE	PAID OR RECEIPT NO.	DOC.	FILE
12. 5 mailed	Clerk				
NINTH DISTRICT TRANSFER FROM MARIANA CIVIL ACTION 8799					
12. 6 mailed	Mailed	6/21/70	57891	5.00	
Ind. of Action: Inj. relief viol. of constitutional rights	Docket fee Witness fee	6-21-70	57891		5000
action arose at:	Duplication				

[fol. 2]

DOCKET ENTRIES

April 30, 1970 - Filed Complaint for Preliminary Injunction, Permanent Injunction, Declaratory Judgment, Damages and Convocation of Three Judge Court.

April 30, 1970 - Summons issued and handed to U.S. Marshal together with copies of complaint for service on defendants.

April 30, 1970 - Filed Order transferring action to Pensacola Division and that all further pleadings be filed in the Pensacola Division signed by Judge Middlebrooks this date. Certified copies of order handed to Marshal to be served with complaint. (Certified copy mailed to plts' atty.)

April 30, 1970 - Original file mailed to Pensacola Clerk's Office together with certified copy of docket entries

May 1, 1970 - Original file received by Clerk's office in Pensacola - certified copy of docket entries from Talla. office filed

May 4, 1970 - Filed & Entered: Notice of hearing 2:30 p.m. 5/11/70

May 11, 1970 - Deft. Motion to Dismiss

May 11, 1970 - Filed & Entered: Order denying Deft. motion to Dismiss and defendants have 15 days to plead (Arnow D.J.) Copies del'd to counsel for deft. and mailed to Counsel for plaintiff.

May 11, 1970 - Hearing on temporary restraining Order held

May 12, 1970 - Filed & Entered: Temporary Restraining Order restraining defts from enforcing order dated 4/6/70 by Cir. Ct. of 14th Judicial Circuit in case of State of Fla. vs. Robert Mitchem, et al - order shall become effective upon filing of bond by Plt. in the amt. of \$1,000 - shall remain in effect only until hearing by full court - copies to counsel

May 12, 1970 - Deposit of \$1,000 by check by Paul Shimek?

May 13, 1970 - Filed & Entered: Summons returned executed as follows: M. J. Daffin - personal service in Panama City on 5/6/70; Clinton E. Foster personal service in Panama City on 5/6/70

May 13, 1970 - Filed & Entered: Bond of plaintiff in sum of \$1000.00 approved by Clerk

May 15, 1970 - Filed & Entered: Answer of Defendant M. J. "Doc" Daffin

May 22, 1970 - Filed & Entered: Order designating 3-judge court consisting of Judges Arnow, Scott and Simpson - copies to counsel of record

May 22, 1970 - Copies of complete court file mailed to Judges Scott and Simpson copy handed to Judge Arnow

June 4, 1970 - Filed & Entered: Motion for Leave to Amend the Complaint and to Add Party Defendant - copies to 3 judges

June 4, 1970 - Filed & Entered: Amended Complaint for Temporary Restraining Order Preliminary Injunction and Permanent Injunction - copies to 3 judges

June 4, 1970 - Filed & Entered: Notice of Hearing for Temporary Restraining Order copies to 3 judges - copies of notice sent registered mail to Governor and Atty Gen. State of Florida

June 5, 1970 - Filed & Entered: Answer of Deft. Clinton E. Foster

June 5, 1970 - Filed & Entered: Objection of Clinton Foster to joinder

June 5, 1970 - Hearing on Motion and objection and Temp. Restraining Order

June 5, 1970 - Plaintiff's Exh. 1 admitted at hearing on Temp. Restraining Order. (Order of Judge Fitzpatrick to show cause)

June 5, 1970 - Filed & Entered: Temporary Restraining Order restraining Judge Fitzpatrick from calling or holding any contempt hearing based on inj. order of 4/6/70 - order requires no bond and shall remain in force only until the hearing and determination by the full court - hearing to be set as soon as reasonably possible (Arnow, D. J.) - copies to judges counsel of record and Judge Fitzpatrick

[fol, 3]

June 19, 1970 - Filed & Entered: Notice of Hearing set for 11 AM on 6/26/70 - copies to 3 judges by regular mail copies to Gov. and Atty. Gen. St. of Fla. by reg. mail

June 22, 1970 - Filed & Entered: Notice of Hearing set for 11 A.M. 6/26/70 - copies to 3 judges by regular mail and copies to Gov. and Atty. Gen. State of Florida by reg. mail

June 22, 1970 - Filed & Entered: Deft. Foster and Fitzpatrick motion to vacate Temporary restraining Orders

June 24, 1970 - Filed & Entered: Motion to Vacate on behalf of Deft. M. J. Daffin - copies to 3 Judges

June 24, 1970 - Filed & Entered: Notice of Hearing on Motion set for 11 AM on 6/26/70 - copies to 3 Judges - copies to Gov. and Atty. Gen. State of Florida by Certified Mail

June 26, 1970 - Filed & Entered: Plaintiff's amended Notice of Hearing

June 26, 1970 - Hearing held by Judge Arnou on motion to dissolve restraining order held - under advisement - counsel to have until Wednesday July 1, 1970 to file briefs

July 2, 1970 - Filed & Entered: Plaintiff motion for leave to file supplemental Complaint

July 2, 1970 - Filed & Entered: Amended Complaint for temporary restraining Order, preliminary injunction, and permanent injunction

July 2, 1970 - Filed & Entered: Notice of hearing for temporary Restraining Order, contempt Order, return of material - copies mailed to Governor and Attorney General State of Florida by Registered mail

July 8, 1970 - Filed & Entered: Defts' objections to plaintiff's motion for leave to file amended complaint.

July 8, 1970 - Filed & Entered: Motion of deft M. J. "Doc" Daffin, as Sheriff of Bay Count, Fla., to strike

July 8, 1970 - Filed & Entered: Motion of deft M. J. "Doc" Daffin, as Sheriff of Bay County, Fla., to dismiss amended complaint

July 8, 1970 - Filed & Entered: Motion of deft M. J. Doc Daffin, as Sheriff of Bay County, Fla., for order to pay this deft witness fees and mileage.

July 8, 1970 - Filed & Entered: Motion of defts Judge Fitzpatrick and Clinton E. Foster, Prosecuting Atty of Bay County, Fla., to dismiss the complaint as amended and/or supplemented

July 8, 1970 - Hearing held by Judge Arnou and Order filed and entered in open court granting plaintiff's motion for leave to file supplemental complaint herein filed on 7/2/70. Court announced that application for Temporary Restraining Order, Preliminary Injunction, Contempt Order and motion for return of material will be heard by the Three-Judge Court at Tallahassee, Fla., at 10:00 A.M., EDT, 7/16/70..

July 8, 1970 - Copies of Order filed in open court mailed this date to all counsel and mailed and/or delivered to Three Judge Court.

July 8, 1970 - Filed & Entered: Order setting certain applications and motions for hearing before the Three-Judge Court at Tallahassee at 10 AM, 7/16/70. Copies mailed to all counsel of record and mailed/and/or delivered to the three judges. Copies sent via registered mail to Gov. Kirk & Atty Gen. Faircloth.

[Pl. 4]

July 10, 1970 - Filed & Entered: Reporter's Transcript of hearing on temporary Restraining Order - copies mailed to each of the Three Judges

July 13, 1970 - Copies of all the pleadings filed by defendants on 7/8/70 mailed and/or delivered to each of the three judges.

July 16, 1970 - Hearings held by 3 Judge Court in Tallahassee on Deft. Motion to strike and on Plt's application for Preliminary Injunction and on Deft's Motion to dissolve Temp. Restraining Order (Simpson, Scott and Arnou. Motion to strike granted - others taken under advisement

July 20, 1970 - Filed & Entered: Answer of J. J. Daffin (Copies mailed to 3 judges)

July 22, 1970 - Filed & Entered: Order and opinion of 3 judge Court Application for Preliminary Injunction Denied;

Motion to dissolve T.R.O of 5/12/70 and 6/5/70 granted; Motion to strike granted; Ruling on Motions to dismiss deferred pending filing of briefs on or before 8/15/70 (Simpson, Scott & Arnow) Copies to all counsel and to each of the three judges

July 23, 1970 – Filed & Entered: Plaintiff's motion for pre-trial conference and final hearing. Copies to each of the three judges.

July 29, 1970 – Filed & Entered: Plaintiff's Brief on the Constitutionality of §847.011, 823.05 and 60.05 – copies to each of the 3 judges

July 30, 1970 – Filed & Entered: Defendant Clinton E. Foster's motion to dismiss amended complaint and his answer to amended complaint. Copies to each of the three judges. (COPIES DELIVERED TO JUDGES ON 7/31/70.)

August 14, 1970 – Filed & Entered: Brief of defendant M. J. "Doc" Daffin as Sheriff of Bay County, Fla. Copy to each of the three judges.

August 14, 1970 – Filed & Entered: Memorandum in Support of Defendant's Motion to Dismiss for Lack of Jurisdiction. Copy to each of the three judges.

August 14, 1970 – Filed & Entered: Plaintiff's Brief re this Court's July 22, 1970 Order – copy to each of the 3 judges

August 21, 1970 – Filed & Entered: Notice of Appeal to the Supreme Court of the United States.

August 24, 1970 – Mailed: Copies of Notice of Appeal to each of the three judges.

September 4, 1970 – Filed & Entered: Request for certificate of record, proposed stipulation and contents of record – copy to each of 3 judges

September 15, 1970 – Filed & Entered: Plaintiff's application for a declaratory judgment is denied without consideration of merits and this action is dismissed – Deft. awarded Judgment of taxable costs to be assessed, by the Clerk (Simpson, Scott and Arnow) Copies to Counsel

September 15, 1970 - J.S. 6 prepared and mailed to Clerk, Tallahassee, witnessed by Keller

September 30, 1970 - Record on Appeal prepared and delivered to Paul Shimek, counsel for appellant, for transmittal to the U. S. Supreme Court.

[fol. 5]

In the United States District Court
For the Northern District of Florida
Marianna Division

Robert Mitchum, d/b/a The Book Mart, Plaintiff.

v.

Clinton E. Foster, as Prosecuting Attorney of
Bay County, Florida, and M.J. "DOC" Daffin,
as Sheriff of Bay County, Florida, Defendants.

**COMPLAINT FOR PRELIMINARY INJUNCTION,
PERMANENT INJUNCTION, DECLARATORY JUDGMENT,
DAMAGES AND CONVOCATION OF THREE
JUDGE COURT — Filed: Apr. 30, 1970.**

To the Honorable David L. Middlebrooks, Judge of Said
Court:

Complainant, by and through his attorney, Paul Shimek, Jr., Esquire, complains of the Defendants jointly and severally, respectfully alleges as follows:

1. This is a civil action whereby Plaintiff prays that a preliminary injunction issue to restrain the Defendants, their agents, servants, employees and/or attorneys, and each of them from the continued suppression of presumptively protected First Amendment materials. The Plaintiff further seeks a Declaratory Judgment that Section 847.011 et seq., titled "Prohibition of Certain Acts in Connection with Obscene, Lewd, etc. Materials", Section 823.05 and Section 60.05 of the Florida Statutes Annotated relating to "Abatement of Nuisances", and each and all be declared unconstitutional as written and/or as the same have been and continue to be applied in the results obtained and/or have been threatened to be applied by the Defendants, as will be more fully set out herein.

Plaintiff prays further that a preliminary and permanent injunction issue enjoining Defendants from continuing under color of enforcement of the said state statutes, the prosecution and/or threats of prosecutions of the Plaintiff insofar as said criminal prosecutions or threats of prosecution relate to the sales and/or [fol. 6] seizures of presumptively protected First Amendment printed publications and materials not first adjudicated to be obscene after due notice and a judicially superintended adversary hearing. Plaintiff further prays that a preliminary and permanent injunction issue enjoining the Defendants from commencing any criminal prosecution of and from making any arrests, seizures and suppressions of printed material under color of enforcement of the said state statutes without first providing, before any arrest, seizure and/or suppression, a judicially superintended adversary hearing, after notice to the Plaintiff, on the issue of obscenity vel non of publications in the possession of the Plaintiff.

2. Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions herein presented by Title 28, U.S.C.A., Section 1343, Title 42, U.S.C.A., Section 1983, Article III, Section 2 of the Constitution of the United States.

Prayer for declaratory relief is founded on Rule 57 of the Federal Rules of Civil Procedure as well as Title 28, U.S.C.A., Section 2201.

Injunctive relief is sought under Rule 65 of the Federal Rules of Civil Procedure.

Jurisdiction of the Court is also invoked pursuant to Title 28, U.S.C.A., Section 1331(a), this being a civil action wherein the matter in controversy exceeds, exclusive of interest and costs, the sum and value of Ten Thousand Dollars (\$10,000.00) and applies under the Constitution and laws of the United States.

Jurisdiction for convocation of a Three-Judge Court is required by Title 28, U.S.C.A., Sections 2281 and 2284.

3. ROBERT MITCHUM is the owner of the sole proprietorship known as THE BOOK MART. He is engaged in the sale and offering for sale of books, magazines, newspapers, movie films, pictures and other materials presumptively protected under the First Amendment to the Constitution of the United States. Plaintiff operates the store dispensing adult-type publications, comparable [fol. 7] to those declared not to be obscene by the Supreme Court of the United States and many inferior Federal Courts, and hence are protected expression under the First Amendment to the Constitution of the United States to interested adults. No sales or offering are knowingly made by the Plaintiff to minors under the age of eighteen (18) of any adult-type materials being distributed by the Plaintiff to interested adult citizens of Bay County, the State of Florida, or visitors thereto; nor are any said minors knowingly permitted to browse or view the materials on display for sale.

4. Upon information and belief, CLINTON E. FOSTER, named as a Defendant in his capacity as Prosecuting Attorney of Bay County, Florida, is the person having the responsibility for cognizance and control of the administration, investigation and prosecutorial enforcement of cases brought to his attention charging or alleging violation of the Penal Laws of the State of Florida, including the Florida Obscenity Statutes, Section 847.011 et seq., the Florida Nuisance Statutes, Section 823.05, and the Injunctive Statutes, Section 60.05, of the Florida Statutes.

5. Upon information and belief, M. J. "DOC" DAFFIN, the Sheriff of Bay County, Florida, cooperates with CLINTON E. FOSTER in unlawfully executing the wishes and desires of CLINTON E. FOSTER in seizing materials,

effecting arrests, and in exercising prior restraint by threat of arrest, by arrest, by seizure or by threat of seizure.

6. At all times relevant hereto, the Defendants, separately and in concert, were acting under color and pretense of law, to wit: Under color of state statutes, custom and usage of Section 847.011, Section 823.05, and Section 60.06 of the Florida Statutes, inclusive.

7. The Plaintiff at all times relevant hereto has operated the book store and retail newsstand known as THE BOOK MART located at 19 Harrison Avenue, Panama City, Florida.

8. On March 30, 1970, Clinton E. Foster, Prosecuting Attorney for Bay County, Florida, filed in the Circuit Court, [fol. 8] Fourteenth Judicial Circuit in the State of Florida in and for Bay County, a complaint, a copy of which is hereto attached as Plaintiff's Exhibit 1, wherein he asked the Honorable W. L. Fitzpatrick, Circuit Judge, to issue a temporary injunction without bond against the Defendant therein, your Plaintiff herein, from the conducting or continuing of a nuisance and from removing or in anyway interfering with or mutilating the furniture, fixtures, and movable property including the inventory used in the conduct of the business located at 19 Harrison Avenue, known as The Book Mart. The Defendant Foster prayed a final judgment be made and entered declaring said business to be a nuisance and abating said nuisance and directing the Sheriff of Bay County, the Defendant, M. J. "Doc" Daffin, herein to dispose of same as may be ordered by Judge Fitzpatrick. On March 30, 1970, a subpoena duces tecum was issued requiring the Plaintiff, Robert Mitchum, through his employee to present a copy of each and every book, magazine, periodical, pamphlet, etc. before the Court. Copy of said subpoena duces tecum and summons herewith attached as Plaintiff's Exhibit 2.

On or about March 30, 1970, the Defendant Foster issued a notice of hearing herein attached as Plaintiff's Exhibit 3, and served Exhibits 1, 2, and 3 upon Plaintiff's employee at the premises. The Plaintiff's employee soon after service placed into the mail to Paul Shimek, Jr., Plaintiff's attorney, the Exhibits 1, 2 and 3, which were received by Plaintiff's attorney was involved in a two hour hearing before The Honorable Winston E. Arnow in a post-criminal proceeding and arguments thereon. On April 2, 1970, Plaintiff's attorney was involved in a jury criminal trial most of the day in the Court of Record in and for Escambia County, Florida. On April 3, 1970, Plaintiff's attorney appeared and was involved in three separate courts in Pensacola, Florida, including the Court of Record, Circuit Court in and for Escambia County, in the United States District Court for the Northern District of Florida. At or about 2:00 P.M. after finishing hearings before The Honorable [fol. 9] Winston E. Arnow in the Federal Court, Plaintiff's attorney was required to forthwith journey by verbal order of Judge Fitzpatrick to Panama City, Florida, to present arguments and evidence in the cause. Plaintiff's attorney had orally requested from Judge Fitzpatrick a continuance by telephone for the reason there was insufficient time to communicate said continuance in writing. The Court denied the oral motion for continuance. At trial, Plaintiff's attorney again outlined the reasons he could not proceed on such short notice as outlined in 823.05, which motions are recited in Exhibit 4, the transcript of the record of that trial. No answer has been filed to the Complaint in the Circuit Court in and for Bay County, Plaintiff's Exhibit 1. Plaintiff made numerous objections to the proceedings, reciting in detail the grounds for his objections. During the trial Thomas J. McAuley, Chief of Police of Panama City, Florida, testified that in his opinion most of the thousands of books in the store but not in the courtroom at that time were obscene, that he had talked to numerous persons who had expressed their attitude toward

The Book Mart and its activities indicating that they didn't like The Book Mart being there, they didn't want it to be there, and they wanted to know how they could help to extricate it from the community. McAuley testified that the presence of the Book Mart brought into being the exercise of other First Amendment expression, namely, peaceful picketing, a religious rally, and other exercise of First Amendment rights by the populace of the community. The only testimony before the court which might conceivably be distorted in an arbitrary and abusive manner to be a basis for the determination that a nuisance exists was the testimony of Thomas J. McAuley found from page 27 to page 41 of Plaintiff's Exhibit 4. The Plaintiff presented no testimony but moved to strike all the testimony before the court as being biased and outrageously prejudicial. Twenty-five exhibits were placed before Judge Fitzpatrick, six of which he declared to be obscene and suppressed forthwith. The other nineteen publications which had been subpoenaed via subpoena duces tecum were placed in evidence in the bosom of the court but were not found to be obscene. Approximately [fol. 10] 50 to 75 other publications which had been presented by the Plaintiff's employee in response to this subpoena duces tecum as representative of the thousands of publications at The Book Mart were not placed in evidence and were returned to your Plaintiff.

9. On the basis of the record and on the basis of the finding of obscenity of six publications, the Honorable W. L. Fitzpatrick on April 6, 1970, found that a nuisance existed and issued his temporary injunction entitled order under Chapter 60.05, finding irreparable harm to the people of Florida, and enjoining and shutting down the business on the premises known as 19 Harrison Avenue and brought about a total and complete suppression and prior restraint of presumptively protected materials. The record does not demonstrate that a nuisance exists nor is the nuisance statute constitutional.

Judge Fitzpatrick's April 6, 1970, order is herewith attached as Plaintiff's Exhibit 5.

10. On April 6, 1970, the Plaintiff prayed for a supersedeas staying the order pending appeal which motion for supersedeas was denied on April 9, 1970. Whereupon your Plaintiff prayed to the First District Court of Appeal for a bond and supersedeas and prayed that the First District Court of Appeal review and reverse Judge Fitzpatrick's order denying motion for supersedeas, see Plaintiff's Exhibit 6. The First District Court of Appeal on April 21, 1970, denied your Plaintiff's motion for a stay pending appeal.

The arbitrary and capricious abuse of discretion and the absolute and total suppression of First Amendment rights by the Circuit Court and by the Appellate Court of Florida leaves no doubt that justice cannot be obtained in the lower level nor the appellate court level of the State of Florida and this requires the immediate presentation of this problem to the Federal District Court herein for relief. The entire transcript of proceedings before Judge Fitzpatrick is contained in Plaintiff's Exhibit 4. The Sheriff prevents the Plaintiff from conducting business on his authority bottomed on Judge Fitzpatrick's order. Plaintiff is afraid to open the premises because of fear of immediate incarceration by Sheriff Daffin through Prosecutor Foster.

[fol. 11]

11. The conduct of the Defendants in procuring the order designating as obscene and/or a nuisance presumptively protected materials which, in law, have not been determined to be obscene in the constitutional sense, and from public distribution, magazines, books and various other publications and other First Amendment materials which have not been declared to be obscene after a prior judicially superintended adversary proceeding, has completely dissipated the efforts of the Plaintiff to have the said material sold and accepted as it

is to citizens of the State of Florida as well as the citizens of the other 49 states visiting in Panamá City, Florida, who may personally desire to purchase, view and receive the said publications and materials as may be offered for sale to adults only in a non-obtrusive manner without evidence of the "sort" of pandering condemned by the Supreme Court in *Ginzburg vs. U. S.*, 383 U.S. 462, *Redrup vs. New York*, 386 U.S. 767.

12. The aforesaid conduct of the Defendants in making the suppressions as aforesaid, as well as continuing to suppress the said publications and materials is an unlawful "prior restraint" condemned by the Constitution of the United States, more particularly the First, Fourth, and Fifth Amendments thereof, as made obligatory on the states under the Fourteenth Amendment, and has had a "chilling effect" on the exercise of the First Amendment rights of the Plaintiff. The Plaintiff has found it necessary to temporarily divest himself of all materials and has been forced to knuckle under the police state tactics of the power drunk officials, wearing badges and guns.

13. As a result of the conduct of the Defendants the Plaintiff has been intimidated in his trade and business and has suffered and continues to suffer complete loss of profits as well as damages as a result of the substantial interference with Plaintiff's advantageous business relations.

14. As a further result of the unconstitutional conduct of the Defendants, the Plaintiff has been required to retain an attorney to defend him against unfounded criminal charges and civil actions based upon a state obscenity law, Section 847.011, [fol. 12] as well as the state nuisance statutes, Section 823.05, and Title 6, Section 60.05, of the Florida Statutes, known by the Defendants to be unconstitutional as written and/or as the same have been applied in a manner to obtain results repugnant to the United States Constitution as aforesaid.

15. The Defendants unlawfully, deliberately, knowingly, willfully and/or by reasons of inexcusable negligence, have deprived and continue to deprive the Plaintiff and the adult public of their respective rights, privileges and immunities secured to them by the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States under color of enforcement of state statutes by:

A. Arbitrarily forbidding, contrary to the applicable decisions of the United States Supreme Court, various Federal Appellate, U. S. District Courts and other state courts of competent jurisdiction, as well as the Constitution of the United States, the right of Plaintiff to keep for sale, distribution or offer for sale and distribution, publications and materials dealing with nudity and/or sex in a non-obscene manner; and further

B. By arbitrarily and capriciously deciding to act and acting as censors of presumptively protected publications and in a manner contrary to law, which has had the effect of depriving the citizens of the State of Florida and citizens of the other forty-nine states access to non-obscene publications and materials dealing with nudity and/or sex; and further

C. By suppressing from distribution the publications and materials dealing with nudity and/or sex in a non-obscene manner, without a prior judicially superintended adversary hearing, [fol. 13] Defendants have caused Plaintiff to sustain untold monetary damages in addition to the substantial and irreparable damages occasioned by the wholly unconstitutional conduct of Defendants under color of state statutes as aforesaid.

16. The statutory provisions of the State obscenity law, Section 847.011 are repugnant to the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the

United States, and should be so declared by this Court for one and/or all of the following reasons:

A. Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such are repugnant to the Due Process provisions of the Fifth, and Fourteenth Amendments to the Constitution of the United States; and further;

B. Said statutory provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedom in that said provisions set forth standards for determining and regulating obscenity at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court in connection with publications presumptively protected under the First and Fourteenth Amendments, and further;

C. The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of First Amendment freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of the federal and state constitutional rights of citizens of Florida and the United [fol. 14] States, as well as Plaintiff, to publish, distribute, circulate, sell, receive and/or purchase printed publications; and further;

D. Said statutory provisions are repugnant to the substantive Due Process provisions of the Fifth and Fourteenth Amendments to the United States Constitution because they permit deprivation of liberty and/or property interests for the exercise of First Amendment rights by

unreasonable, arbitrary, and capricious means by law enforcement officials of the State of Florida without a showing of a real and substantial relationship to any state subordinating interest which is compelling to justify state action limited First Amendment Freedoms, and further;

E. Said statutory provisions are impermissibly broad and repugnant to the procedural due process requirements of the Fifth and Fourteenth Amendments of the Constitution of the United States by employing means lacking adequate safeguards which Due Process demands to assure non-obscene material the constitutional protection of the First Amendment to which it is entitled; and further;

F. Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States in that said statutory provisions permit unlawful prior restraints by law enforcement officials of the State of Florida, and further;

G. Said statutory provisions are further void for impermissible overbreadth in that there is no *scienter* requirement requiring that the party sought to be held criminally accountable have knowledge of the fact and character of the obscenity of the material charged; and further;

[fol. 15]

H. Said Section 847.011 is void for impermissible overbreadth in that it creates an unconstitutional presumption under Sub-Section (1) (b) that, "The knowing possession by any person of six or more identical or similar materials... coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph," which presumption could be applied by

Defendants to constitutional private possession (See *Stanley vs. Georgia*, 394 U.S. 557 (1969)) as well as to commercial possession for distribution to adults only in a non-obtrusive manner not encroaching on the rights of others who wish to avoid confrontation with the adult-type materials. Said presumption permits law enforcement officials—including Defendants, to charge citizens of the State of Florida with possession of purportedly obscene materials where there is no direct evidence of any criminal speech; and further;

I. Said Section 847.011 et seq. is void for vagueness and violative of Due Process in that each Section does not set out by its terms any constitutionally relevant and permissible definition of what constitutes "obscene matter", and further;

J. Said Section 847.011 et seq. is further void because it fails to distinguish between constitutionally protected personal possession and public possession of materials alleged to be obscene, and further;

K. Said statutory provisions are further void for impermissible overbreadth and repugnant to the Constitution as aforesaid in that the determination of obscenity *vel non* is a question of law and not a question of fact.


17. The provisions of Section 823.05 and Title 6, Section 60.05 relating to declaring a place to be a nuisance and providing for the abatement of the same by using the guidelines of "which tends to annoy the community or become manifestly injurious to the [fol. 16] morals or manners of the people" as applied by the Defendants in seeking and/or obtaining a temporary restraining order and permanent injunction are repugnant to the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States as written and/or as the same have been employed and applied by said Defendants against your Plaintiff, in that:

A. Said statutes are void because the standards therein permitting the maintenance or expression to be enjoined and declared to be a nuisance solely on the grounds that the same "tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals of the people" are unconstitutionally vague and broad and therefore are in violation of the First and Fourteenth Amendments to the Constitution of the United States; and

B. Said statutes are void because the terms "nuisance" and "annoy the community" and "injure the health of the community" or "become manifestly injurious to the morals of the people" contained therein are so vague, indefinite, and broad that they do not afford any reasonable standards for the imposition of restraints upon freedom of expression and therefore are repugnant to the guarantees of the First and Fourteenth Amendments to the Constitution of the United States; and,

C. Said nuisance statutes when applied to the operation of the place of business by your Plaintiff, and the subject matter sold therein, violate the First and Fourteenth Amendments to the Constitution of the United States because of the absence of the following procedural safeguards required by the decisions of the U. S. Supreme Court and other federal courts:

1. There is no requirement or assurance therein, or in any other provisions of the laws of Florida, for a prompt judicial decision, including appellate review, of the question of whether the actions [fol. 17] described in Section 823.05 is a "nuisance" which may be restrained thereunder; and,



2. There is no provision in said statute, or elsewhere in the laws of Florida, which requires or assures that any restraint of the described action of the said Defendants shall be postponed until a judicial determination of the question of nuisance (in this case applying the doctrine of obscenity as a nuisance statute) following notice and an adversary hearing.

D. Said nuisance statutes are void as written and as applied because there has been established thereby no precise objective standards by which the work restrained or objected to may be judged as well as procedural safeguards adequate to insure that constitutionally protected expression will not be unduly curtailed. The questionable determination of obscenity of six publications and the resulting suppression of thousands of publications never reviewed by the declaration that there is a nuisance and the approval by state court on the trial level and appellate court of the procedure of refusing a bond pending review where both have before them the flimsy records herein described as Plaintiff's Exhibit 4 clearly demonstrating the most abusive disregard of the law and this court should declare such abuse to be an unlawful prior restraint with a freezing effect upon the exercise of any of the Plaintiff's First Amendment rights.

18. The transcript of the record has already been placed in the hands of the Defendants and exhibit 4 is accordingly not attached to any copies of this complaint.

19. Plaintiff avers that the issuing of the subpoena duces tecum was an effort to lawfully bring about a massive seizure which temporarily shut down the premises. The subsequent order in shutting down the premises has resulted in virtually all of the publications being completely and totally suppressed in their distribution [fol. 18]. Plaintiff alleges that the unlawful and abusive order shutting down the premises

has caused him loss of substantial profit, that - the notoriety and publicity of the actions of the Defendants have done irreparable harm and injury to the business and personal reputation of the Plaintiff all to his damage. The Plaintiff who desires to open cannot do so because of the presence of the Sheriff enforcing an illegal order in a deliberate suppression of First Amendment rights.

20. Plaintiff is entitled to and desires that this Court enter a declaratory judgment on final hearing upon the provisions of 28 U.S.C. 2201 and Rule 57, Federal Rules of Civil Procedure, declaring the State of Florida obscenity statute 847.011 and Section 823.05 and Title 6, Section 60.05, relating to the abatement of public nuisances to be unconstitutional as written and/or as the same have been and are being applied to Plaintiff herein.

21. The patently unconstitutional manner of application of the said statutory provisions of the State of Florida obscenity statute, nuisance statute and injunction statute, which statutory provisions purport to regulate on or restrain the exercise of the freedom of expression, freedom of press and speech under the First Amendment, undertaken by the Defendants in bad faith enforcement of the law, justifies and requires federal equitable relief from the aforesaid unconstitutional pending state criminal prosecutions against the Plaintiff and based on publications and materials not first declared to be obscene after a judicially supervised adversary hearing.

22. Plaintiff is entitled to and desires that this Court issue a preliminary injunction restraining and enjoining each of the Defendants and persons in active concert with them from:

A. Procuring an order bottomed upon the nuisance and obscenity statutes directing the continued suppression of publications and materials by the closing down of the premises on the false and fraudulent charge of its being a nuisance.

B. Interfering in any way with the instanter reopening [fol. 19] of The Book Mart and the continued selling of presumptively protected materials.

C. Further attempted or continued suppression of the publications and materials at The Book Mart until there has been a prior judicially superintended adversary hearing on each and every publication which the State of Florida desires to suppress and from enforcing in any way whatsoever the State of Florida's nuisance statute Section 823.05 and the injunction statute, Section 60.05, in combination therewith.

23. Plaintiff is entitled further to and applies for a permanent injunction restraining Defendants, their agents, servants, employees and attorneys, and any and all other persons acting under their direction and control, and each of them, and persons in active concert or participation with them from continuing the following unconstitutional and unlawful acts, to-wit:

A. Enforcing the State of Florida obscenity statute, Section 847.011 et seq. of the Florida Statutes Annotated because of the unconstitutionality of said statute as written and/or as applied, in a manner repugnant to the constitutional rights of Plaintiff.

B. From enforcing the State of Florida nuisance statutes, Section 823.05 and Title 6, Section 60.05 of the Florida Statutes Annotated, because of the facial

unconstitutionality of each and/or as each has been applied under the factual allegations herein stated.

C. Engaging in any arrests, searches, seizures and suppressions under color of any state law allegedly regulating obscenity without first giving due notice to Plaintiff and providing for a judicially superintended prior adversary hearing on the issue of determination of the obscenity, vel non of the materials sought to be seized and suppressed or the basis for an arrest, and then only under procedural safeguards designed to assure adequate vindication of the Plaintiff's constitutional rights.

[fol 20]

24. As a result of the wholly unconstitutional conduct of Defendants in depriving Plaintiff of his rights under the Constitution and laws of the United States, Plaintiff is entitled to damages.

25. That the Plaintiff upon his application for a preliminary and permanent injunction by verified complaint, restraining Defendants and/or their agents, servants, employees and/or attorneys, from enforcing the State of Florida obscenity statute as aforesaid because of the facial unconstitutionality of each and/or as the same has been unconstitutionally applied, as well as a preliminary and permanent injunction restraining the enforcement of the State of Florida nuisance statutes as aforesaid because of the facial unconstitutionality of each and/or as the same has been unconstitutionally applied, make application for the convocation of a three-judge court as required by Title 28 U.S.C.A. Section 2281, and request the Chief Judge of the United States Court of Appeals for the Fifth Circuit be notified pursuant to Section 2284 of Title 28, U.S.C.A., of the presentation of Plaintiff's application as aforesaid, in order that the necessary designation of Judges for said Court may

be had for the determination of the substantial Constitutional issues presented by this controversy.

WHEREFORE, Plaintiff prays:

1. That a preliminary injunction of this Court issue upon hearing restraining Defendants and/or their agents, servants, employees and attorneys pending a hearing and determination of Plaintiff's application for permanent injunction from:

A. Procuring an order bottomed upon the nuisance and obscenity statutes and materials by the closing down of the premises on the false and fraudulent charge of its being a nuisance.

B. Interfering in any way with the instanter reopening of The Book Mart and the continued selling of presumptively protected material.

[fol.21] C. Further attempted or continued suppression of the publications and materials at The Book Mart until there has been a prior judicially superintended adversary hearing on each and every publication which the State of Florida desires to suppress and from enforcing in any way whatsoever the State of Florida's nuisance statute Section 823.05 and the injunction statute, Section 60.05, in combination therewith.

D. Making any arrests or seizures of publications or other materials in the possession of the Plaintiff without first proceeding by way of a judicially superintended adversary proceeding on the issue of obscenity of the publications or materials sought to be condemned, provided first that adequate notice be given to Plaintiff and his attorney, consistent with due process provisions of the Fifth Amendment.

2. That Defendants, and each of them, be required to forthwith answer this complaint in conformance with the rules and practices of this Honorable Court, and

3. That a declaratory judgment be rendered declaring the State of Florida's obscenity statute and the State of Florida's nuisance statutes, as aforesaid, to be unconstitutional on their face and/or as the same have been unconstitutionally applied to the controlled distribution of adult-type materials in a non-obtrusive manner by Plaintiff herein; and

4. That a three-judge court be convened under law and issue a permanent injunction restraining and enjoining Defendants and/or their agents, servants and/or employees and/or persons acting under their direction or control from continuing the following unauthorized and unconstitutional acts, to-wit:

A. Enforcing or executing State of Florida obscenity Statute, Section 847.011 et seq. of the Florida Statutes Annotated.

B. From engaging in any arrests, searches, seizures and suppressions under color of any state law purporting [fol. 22] to regulate obscenity, without first giving due notice to Plaintiff and providing for a judicially superintended prior adversary hearing on the issue of the determination of obscenity vel non of the materials sought to be seized and suppressed or the basis for arrest, and then only under procedural safeguards designed to assure adequate vindication of Plaintiff's Constitutional rights.

5. That judgment be rendered herein for damages in favor of Plaintiff against Defendants Foster and Daffin, in their capacity as Prosecuting Attorney of Bay County, Florida, and

Sheriff of Bay County, Florida, respectively, jointly and severally, in the amount of One Hundred Thousand Dollars (\$100,000.00); and

6. That the Clerk give notice, by certified mail, at the time of Plaintiff's application for preliminary injunction, and complaint and notice of hearing, to His Excellency, Claude W. Kirk, Governor of the State of Florida, and The Honorable Earl Faircloth, Attorney General of the State of Florida, as such notice is required by law; and

7. That Plaintiff have such other and further relief as may be appropriate under the circumstances in this case together with costs.

Respectfully submitted,
Paul Shimek, Jr.
Attorney for Plaintiff.

[fol. 23] Affidavit (Omitted when printed)

[fol. 24] _____
In the Circuit Court, Fourteenth Judicial
Circuit of the State of Florida,
In and For Bay County

State of Florida, Plaintiff,

—vs.—

Robert Mitthum, et al., Defendants.

COMPLAINT

COMES NOW the plaintiff, STATE OF FLORIDA, by and through its undersigned County Prosecuting Attorney,

and files this, its complaint, for an injunction and declaration of rights against the defendants, and states:

1. This action is brought and prosecuted for the purpose of enjoining and abating a certain public nuisance as defined by Section 823.05, Florida Statutes, and as authorized by Section 60.05, Florida Statutes.

2. The defendant, ROBERT MITCHUM, is the owner of a business known as THE BOOK MART and is the lessor or renter of a certain portion of land and building located at 19 Harrison Avenue, Panama City, Florida, upon which the business known as "The Book Mart" is carried on and maintained; and the defendant, CLARENCE HOWARD CANTEY and DAVE BALLUE, is the employee, agent or servant of Robert Mitchum, and operates, maintains, and carries on the business known as "The Book Mart" located at 19 Harrison Avenue, Panama City, Florida. That the said business known as "The Book Mart" has been operated, carried on and maintained at 19 Harrison Avenue, Panama City, Florida [fol. 25] since shortly prior to February 28, 1970.

3. Since shortly prior to February 28, 1970, up until the present time, the defendants have been using, occupying and maintaining the premises known as 19 Harrison Avenue, Panama City, Florida, for the purpose of selling, distributing, transmitting, or offering to sell, distribute or transmit, or having in their possession, custody or control with the intent to sell, distribute or transmit, obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic books, magazines, periodicals, pamphlets, newspapers, comic books, story papers, written or printed story or article, writing, paper, cards, pictures, drawings, or photographs.

4. That on the 5th day of March, 1970, the defendants sold the following named magazines, to-wit: SILK & SATIN; PLAYMATES, Vol. No. 1, No. 1; PLAYMATES, Vol. 1, No. 2; DEBUTANTES, Vol. 1, No. 1; THE NEWLYWEDS, Vol. 1, No. 1; SHOCKING INTERVIEWS, Vol. 1, No. 1; that on the 6th day of March, 1970, the defendants sold the magazine described as WILD SCREEN REVIEW, Vol. 1, No. 5; that on March 19, 1970, the defendants sold the magazines described as "DOUBLE UP and AUTO-FELLATIO AND MASTURBATION; that on the 24th day of March, 1970, the defendants sold the magazines described as: ROULETTE, Vol. 3, No. 4; THE SPECIAL, No. 4; A STUDY OF GROUP SEXUAL PRACTICES, ILLUSTRATED CASE HISTORIES, Vol. 1, No. 1; and the newspaper, SCREW, THE SEX REVIEW, No. 24; that on March 27, 1970, the defendants sold the magazines; DREAM BOY, No. 1; ESOTERIA, No. 10, and SIREN.

5. That all of the aforesaid books and magazines depict and portray nude males and females engaged in lewd, lascivious, filthy and indecent sexual acts, and prominently exposing and displaying the genitalia and engaging in unnatural sex acts or suggested unnatural sex acts, or homosexual acts or suggested homosexual acts. The written and printed matter, if any, in all of the aforesaid magazines and newspapers is devoted predominantly to describing natural, [fol.26] unnatural, homosexual, incestuous and perverted sexual activities by constant and repeated usage of four-letter words of the filthiest and most vulgar kind. All of the aforesaid material is devoted predominantly, if not entirely, to the presentation and exploitation of illicit sex and passion and immorality to such an extent that to the average person, applying contemporary community standards, the dominant theme of the material depicted and portrayed therein, taken as a whole, appeals to the prurient interest.

6. All of the sales alleged in paragraph 4 above were made by the defendants at 19 Harrison Avenue, Panama City, Florida, and in addition thereto, plaintiff upon information and belief alleges that the defendants between February 28, 1970 and the date of this complaint have sold numerous other magazines from 19 Harrison Avenue, Panama City, Florida, the names of most of which are unknown to plaintiff. However, plaintiff upon information and belief alleges that the said magazines were and are of the nature, kind and content as alleged in paragraph 5 above.

7. Plaintiff upon information and belief, alleges that the defendants have stored and displayed for sale at 19 Harrison Avenue, Panama City, Florida, various and numerous other books, magazines, periodicals, pamphlets, newspapers, comic books, story papers, written or printed story, article, writing, paper, card, pictures, drawings or photographs of the kind and nature and content described in paragraphs 3 and 5 above. That all of the above described material is held by the defendants for sale at 19 Harrison Avenue, Panama City, Florida and unless enjoined by this Court they will sell said material. That a subpoena duces tecum should be issued against the defendants requiring them to produce before this Court at such time and place as this Court may require, one copy of each of the books, magazines, periodicals, pamphlets, newspapers, comic books, story papers, written or printed story or article, writing, paper, card, picture, drawing, or [fol. 27] photograph located on the premise of 19 Harrison Avenue, Panama City, Florida so that this court may make an inquiry into the nature and content of said materials.

8. Plaintiff alleges that the activities of the defendants at 19 Harrison Avenue, Panama City, Florida as above alleged

have caused and will continue to cause and result in immediate and irreparable harm and damage to the morals, welfare and safety of the people of the State of Florida; and that the present activity at 19 Harrison Avenue, Panama City, Florida has caused and continues to cause immediate and irreparable harm and damage to the morals, welfare and safety of the local communities in proximity to 19 Harrison Avenue, Panama City, Florida..

9. That the activities of the defendants at 19 Harrison Avenue, Panama City, Florida violate 847.011 Florida Statutes and in addition thereto constitute a nuisance to the people of the State of Florida under Chapter 823 Florida Statutes for the following reasons:

A. Places where the laws of the State of Florida are being violated and buildings in which acts and conduct are engaged in which are manifestly injurious to the morals and manners of the people are a nuisance. Such injury to the public morals is manifest from the defendants acts and conduct in selling, transmitting, offering to sell or transmit and exhibiting the materials described in paragraphs 3 and 5 above which are predominantly devoted to the presentation or portrayal either by photographs or written word of exaggerated attention to the genitalia, unnatural sex acts or suggested unnatural sex acts or homosexual acts or suggested homosexual acts, acts of incest and other perverted sex acts constitute conduct which degrade the sex function and is contrary to good morals and public decency in that it is injurious to the overriding public interest and a strong family relationship as reflected by the laws of the State of Florida which in the furtherance of good morals and public decency has confined the sex function to men [fol. 28] and women of certain maturity who are united in a permanent sexual relationship.

10. That the conduct and activities of the defendants as above alleged all occurred at 19 Harrison Avenue, Panama City, Florida, and is detrimental to the public good and to the common welfare; such acts are offensive to public decency, morals, peace and health and constitute a nuisance which is subject to abatement under Chapter 60, Florida Statutes and should forthwith be enjoined and abated; and unless enjoined by the Court, the defendants, and each of them by themselves or through their agents and representatives will continue to carry on the activity above alleged at 19 Harrison Avenue, Panama City, Florida.

11. That the common theme and general reputation of the building and premises known as 19 Harrison Avenue, Panama City, Florida, is that it is a place kept, conducted and maintained for the purpose of selling and offering for sale, material described in paragraphs 3 and 5 above.

12. That plaintiff is without an adequate remedy at law.

13. That this Court should retain jurisdiction of this cause upon final hearing to enter such further and additional orders as the circumstances might require.

WHEREFORE, plaintiff prays:

A. That this court make a determination as to the nature and content of the magazines specifically described above, including those which may be brought before the Court pursuant to a subpoena duces tecum except those magazines alleged to have been purchased on the 5th day of March, 1970 and the 24th day of March, 1970 in paragraph 4 of plaintiff's complaint.

B. That a temporary injunction issue without bond against the defendants and each of them until further order of

this Court, from continuing such nuisance and from removing or in any way interfering with or mutilating the furniture, fixtures and movable property [fol. 29] including inventory used in the conduct of such nuisance as herein described, regardless of who the owner may be or whether the owner had notice of this action, and that said defendants be restrained from in any way or manner, personally or through any agent, servant, tenant, representative or employee, either directly or indirectly in any manner whatever from erecting, establishing, continuing, using, owning or releasing said premises and building known as 19 Harrison Avenue, Panama City, Florida, to further use for the activities and conduct alleged in this complaint.

C. That upon final hearing herein and as a part thereof, a final judgment shall be made and entered abating said nuisance, which said order shall direct the Sheriff of Bay County, Florida to remove from the building and property herein described all furniture, fixtures, and movable personal property of whatever kind or nature used in conducting and maintaining said nuisance and directing the Sheriff to dispose of same in the manner ordered by this Court and direct said Sheriff to effectually close the building and premises known as 19 Harrison Avenue, Panama City, Florida against its use for any purpose prohibited by order of this Court. That this Court grant the plaintiff such other and further relief in the premises as may be just and equitable and that all costs be assessed against the defendants. That this Court retain jurisdiction for the purpose of entering such further and additional orders as the circumstances might require.

CLINTON E. FOSTER,
Prosecuting Attorney

[fol. 31]

In the Circuit Court, Fourteenth Judicial Circuit
Of the State of Florida, In and For Bay County

State of Florida, Plaintiff,

v.

Robert Mitchum, Dave Balue, Clarence Howard Cantey, a business known as The Book Mart, a certain portion of land and building located at 19 Harrison Avenue, Panama City, Florida, and all other persons claiming any right, title or interest in the property affected by this action, , Defendants.

SUBPOENA DUCES TECUM

STATE OF FLORIDA

TO: Robert Mitchum, Dave Ballue, Clarence Howard Cantey, a business known as **THE BOOK MART**, a certain portion of land and building located at 19 Harrison Avenue, Panama City, Florida, and all other persons claiming any right, title or interest, in the property affected by this action:

YOU ARE HEREBY COMMANDED to appear before the Honorable Warren L. Fitzpatrick, Judge of said Court at the Bay County Courthouse, Panama City, Florida, on the 3rd day of April, 1970 at 1:30 o'clock, P.M., to testify in the above styled cause and to have with you at said time and place the following:

A. One copy of each book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story, article, writing, paper, card, picture, drawing or photograph located upon the premises of 19 Harrison Avenue,

Panama City, Florida, at the time this subpoena duces tecum is served upon you.

If you fail to appear or have with you the above named items, you may be in contempt of Court.

[fol. 32]

You are subpoenaed to appear by the following attorneys, and unless excused from this subpoena by these attorneys or the Court, you shall respond to this subpoena as directed.

WITNESS my hand and the seal of this Court on the 30th day of March, 1970.

BRUCE COLLINS,
Clerk of Circuit Court
Bay County, Florida

By Mary Lou Self,
Deputy Clerk

[fol. 33]

SUMMONS

In the Circuit Court
14th Judicial Circuit of Florida,
Bay County, Florida

Case No. 70-292

Division B — Judge Fitzpatrick

STATE OF FLORIDA, Plaintiff,

—vs.—

ROBERT MITCHUM, DAVE BALLUE, et al., Defendant.

THE STATE OF FLORIDA:

To All and Singular the Sheriffs of said State:

YOU ARE HEREBY COMMANDED to serve this summons and a copy of the complaint or petition in the above styled cause upon the defendant Dave Ballue, individually, and as Agent for Robert Howard Mitchum, a non-resident.

Each defendant is hereby required to serve written defenses to said complaint or petition on Hon. Clinton E. Foster, plaintiff's attorney, whose address is 1610 Beck Avenue, Panama City, Florida, within 20 days after service if this summons upon you, exclusive of the day of service, and to file the original of said written defenses with the clerk of said court either before service on plaintiff's attorney or

immediately thereafter. If you fail to do so, a default will be entered against you for the relief demanded in the complaint or petition.

WITNESS my hand and the seal of said Court on March 30, 1970.

BRUCE COLLINS
As Clerk of Said Court

By Mary Lou Self,
As Deputy Clerk

In the Circuit Court, Fourteenth Judicial Circuit
Of the State of Florida, In and For Bay County

State of Florida, Plaintiff,

v.

Robert Mitchum, Dave Balue, Clarence Howard
Cantey, a business known as The Book Mart, a
certain portion of land and building located at
19 Harrison Avenue, Panama City, Florida, and
all other persons claiming any right, title or
interest in the property affected by this action,
Defendants.

[fol. 34]

NOTICE OF HEARING

TO: Robert Mitchum, Dave Ballue, Clarence Howard Cantey,
a business known as THE BOOK MART, a certain
portion of land and building located at 19 Harrison

Avenue, Panama City, Florida, and all other persons claiming any right, title or interest in the property affected by this action:

YOU WILL PLEASE TAKE NOTICE that the undersigned will call on for hearing plaintiff's application for a temporary injunction before the Honorable Warren L. Fitzpatrick in his chambers at the Bay County Courthouse, Panama City, Florida on the 3rd day of April, 1970 at the hour of 1:30 P.M. or as soon thereafter as counsel may be heard:

PLEASE BE GOVERNED ACCORDINGLY.

Clinton E. Foster,
Prosecuting Attorney for
Bay County, Florida

In the Circuit Court, Fourteenth Judicial Circuit,
In and For Bay County, Florida.

Case No. _____

State of Florida, Plaintiff,

v.

Robert Mitchum, et al., Defendants.

TESTIMONY

[fol. 35]

This cause came on before the Honorable W. L. Fitzpatrick, Circuit Judge of the Fourteenth Circuit of Florida, in open court at the Bay County Courthouse, Panama City, Florida, on the 3rd day of April, 1970.

[fol. 37] (The Court) Mr. Foster, you may proceed.

(Mr. Shimek) Your Honor, before Mr. Foster proceeds may I make a couple of motions just for the record?

(The Court) Yes, sir.

(Mr. Shimek) First of all, Your Honor, I received his complaint as soon as it was placed in the mails and I received it on Wednesday but at which time I was before Judge Arnow which brought about the scheduling for today. Yesterday, the 2nd, I was in a jury trial, State versus Taylor, and I was unable to respond in writing. Of course I made my oral motion for continuance based upon my being crammed in my schedule. As a matter of fact, this morning I was in Judge

Mason's Court at 9:00, Court of Record at 9:30, Judge Arnow at 10:30, until we called you. I submit —

(The Court) You need a partner; don't you.

(Mr. Shimek) Yes, Your Honor, he was busy too. So on the basis of that I would move for a continuance on the grounds I am not properly prepared. I recognize the Court will proceed however in light of its being a nuisance.

(The Court) Well, I couldn't permit the people of Bay County to be subjected to something that should be abated if it should because your schedule is tight, Counsel. Of course I will extend you every courtesy I can.

(Mr. Shimek) Thank you, Judge. The second motion I would make would be a motion [fol. 38] to quash the subpoena duces tecum. I would like to announce to the Court and as an officer of the Court I understand it to be the law that there can be no suppression of publications that are presumptively protected by the First Amendment until first of all there has been a judicial determination of obscenity of those publications and I cite Delta Book's (phonetic) copy of the case of which I would have.

I submit that the requiring of a judicial requirement, an order, a subpoena duces tecum, requires a — is a judicial seizure in the sense that it is required that I present them and I am held under contempt if I do not. I would suggest, and not facetiously but in all candor, that these books that are here today either have to be purchased by the State if they're going to use them or that otherwise a judicial seizure has occurred and there has not been a judicial determination of obscenity prior to quasi-judicial or judicial procedure.

I have nothing further in the sense of presenting —

(The Court) I would take that motion under advisement pending the presentation of the evidence by the State.

(Mr. Shimek) Yes, sir. Will the Court hear one more motion?

(The Court) Yes.

[fol. 39] (Mr. Shimek) As the Court knows, it was filed in Pensacola in Federal Court question as to whether or not the statute under which we're proceeding today, the Nuisance Statute, 823.05, and the accompanying Injunction Statute, 60.05, is constitutional as applied and constitutional on its face.

(The Court) Did you put 847 in that same —

(Mr. Shimek) 847.011. Of course it's being —

(The Court) That contains an injunctive procedure in it too.

(Mr. Shimek) Yes, Your Honor, and I understand that we're here today to determine if a nuisance is to be abated on a temporary — the Nuisance Statute is 823.05 and I'm raising the constitutionality of that statute. And I say that's unconstitutional, Your Honor and I have about six reasons if I may recite them, unless you permit me simply to read them into the record later.

(The Court) I would like you to do that if you would.

(Mr. Shimek) All right.

(The Court) 847 has almost identical provisions except it gives the owner more protection in the injunctive proceedings, as the Nuisance Section. I don't know what section Counsel is proceeding under. He quotes all of these statutes I just mention that. Did you attack that section also in your [fol. 40] federal suit?

(Mr. Shimek) Yes, Your Honor. We have already attacked 847.011. There are two three-judge courts sitting in Pensacola and there are three others in the State of Florida.

(The Court) What I'm trying to be sure of is that all the Florida Statutes are under attack that might apply to this procedure.

(Mr. Shimek) Oh no. There is only 823.05, which is the Nuisance Statute, and 60.05, which accompanies it by injunction, is under attack only in one place. A three-judge Federal Court out of Sarasota, I think it's in the Tampa Division, entitled Robert Mitchum vs. Frank Schwab (phonetic) — I don't have the number but it's United States District Court in the Middle District of Florida in the Tampa Division. The three-judge court has already convened, Judge Dyer presiding, and the question of the constitutionality of 823.05 is now being reviewed.

I will read into the record later, if it please the Court, I have many reasons why we say it is unconstitutional. If you'll permit it to be retroactive then I'll do it later because of time.

(The Court) All right.

(Mr. Shimek) And we are here under protest, Your Honor, because we haven't had the time, we think the [fol. 41] statutes unconstitutional. We think that the Court ought to review that matter first, and I'm ready to proceed under that protest. Thank you, Judge.

(The Court) Will admit that you have the right to attack that statute without taking the chance of being prosecuted under the first.

(Mr. Shimek) Thank you, Judge.

(The Court) All right, Mr. Foster, you may proceed.

(Mr. Foster) Mr. Shimek, can we stipulate that items mentioned in Paragraph 4 of the complaint were sold on premises of 19 Harrison Avenue by Mr. Cantley?

(Mr. Shimek) Are those items that there has been a hearing to determine if there was cause to believe that there might be a —

(Mr. Foster) Most of them are.

(Mr. Shimek) If you'll announce to the Court those that have been some hearing on already, I'll stipulate with you. Before Judge Mathis, total eight - six publications? I would stipulate with you.

(The Court) Judge Arnow still have that question under advisement or did he just deny the application?

(Mr. Shimek) Until Tuesday, Your Honor, it's still under advisement. However I have a right to submit a [fol. 42] brief. However at that time if I have not and cannot find my proper authorities, he probably will deny my petition to amend. That was the only question, whether or not the case there should be amended to bring in the governor and the attorney general and whether or not this particular statute, 823.05 and 60.05 or .06 should brought into the same three-judge court which presently is reviewing 847.011. (unintelligible words) - proceeds to follow new suit on this question as opposed to tying that three-judge court with more questions. He feels that that court is already burdened with two cases and subject to my brief he will withhold his ruling until Tuesday.

(The Court) I would like counsel, since I'm not familiar with the history of this case other than what I have seen in the newspaper to advise the Court in the record whether or not any of the federal courts have placed any restraint whatsoever on the state courts in connection with this particular matter under consideration.

(Mr. Shimek) Yes, Your Honor, it's my understanding that Judge Arnow has permitted Mr. Foster to do anything that he wishes within the law except to have criminal trials. Is that right? That's what my understanding is.

(Mr. Foster) If that is your understanding, Mr. Shimek, that's an erroneous understanding. Judge Arnow at this point has ordered me to—he's entered no orders [fol. 43] against me. There is a nebulous understanding that no criminal prosecutions, no criminal cases will be tried prior to June the first of this year, but I'm under no order and I am not committed.

(The Court) I do not want any conflict in jurisdiction. I certainly don't want to enter an order here contrary to another court's order.

(Mr. Shimek) Let me advise the Court precisely then what came about.

(The Court) That's all right, I just want your assurance that there will not be any conflict. There may be a conflict later, I understand that. But at this point we're under no restraint to proceed.

(Mr. Shimek) No, we are not under any restraint at this particular proceeding to proceed.

(The Court) All right. You may proceed.

(Mr. Foster) I don't propose to offer into evidence all the books that are involved in the criminal proceedings, but the ones that I propose to submit for the Court's consideration were the ones involved in the last criminal case made where there was an ex parte hearing before the county judge for the purpose of determining whether or not there was probable cause to believe them obscene.

Those are "Roulette", Volume 3, Number 4; "Especial", Number 4; and "A Study of Group Sex Practices [fol. 44] Illustrated, Case Histories," Volume 1, Number 1.

(Mr. Shimek) Is this the one where there was an arrest warrant, was that the sixth arrest?

(Mr. Foster) It was the last arrest.

(Mr. Shimek) Was the arrest of Mr. Cantley?

(Mr. Foster) Right.

(Mr. Shimek) Mr. Cantley is here. Do you recognize the books? (addressing Cantley)

(Mr. Cantley) Which ones? The ones that were purchased on Saturday night by policemen were not involved in the adversary hearing and the last three magazines and newspaper that was purchased by you and the bailiff were not in the adversary hearing.

(Mr. Shimek) If you would be more specific, I would permit —

(The Court) Show the ones you have in mind to Cantley and let him show them —

(Mr. Foster) I've got a witness here that will testify to it. I thought we would save that much time.

(The Court) All you're asking is stipulation of whether or not those were sold during the time covered in the complaint?

(Mr. Foster) Those were purchased, correct? They were purchased from you. These were the ones that we were before Judge Mathis exparte for.

[fol. 45] (Mr. Shimek) (Exhibiting to Defendant Cantley) I will stipulate that these three magazines were purchased at the Panama City Book Mart.

(The Court) They will be Exhibits 1, 2, and 3.

(Mr. Foster) Your Honor, I want to offer these —

(The Court) During the period covered by the complaint?

(Mr. Foster) I want to offer these for the Court's consideration and I don't want these specific magazines admitted into evidence because they will also be evidence in a criminal prosecution.

(The Court) Be agreeable with you to substitute copies?

(Mr. Shimek) Your Honor, I would object. First of all —

(The Court) Is there a particular reason for this particular volume to be used in a particular case?

(Mr. Shimek) I think that we have had an illegal seizure and I move for the suppression of that evidence. If he's going to offer it into evidence. If it's going to be brought before the Court for any reason I move that it be suppressed, and the basis for the motion for suppression is that there was no prior judicial determination that these magazines are obscene. And therefore they are not available to be used for any purpose. And that would be the basis of [fol. 46] the motion to suppress.

(Mr. Foster) Your Honor, these magazines were bought.

(The Court) That was my understanding.

(Mr. Foster) It just happened that these magazines are also being used as evidence in a criminal prosecution and I know of no reason why they cannot also be used as evidence in this case.

(The Court) I don't either. If you want them released later on —

(Mr. Foster) We would like to offer them.

(Mr. Shimek) I will stipulate that these were purchased by whom?

(Mr. Foster) By Willie Barfield.

(Mr. Shimek) By Willie Barfield.

(Mr. Foster) Your Honor, I'm going to call several witnesses and Mr. Shimek may want these witnesses under the rule. Primarily all they're going to testify to is the purchase of materials. Do you want them under the rule?

(Mr. Shimek) If you represent to me that that's all they're going to testify to I will not invoke the rule. However,

any others that will testify to anything other than a purchase I would invoke the rule.

(Mr. Foster) Let's invoke the rule on Mr. [fol. 47] Burroughs, Mr. McCauley, and Mr. Mathis.

(The Court) Those witnesses come forward, please.

(Mr. Foster) And Mr. Barfield.

(The Court) The witnesses are instructed that you must remain outside the hearing of the taking of the evidence in this cause. You must not talk about this case among yourselves or with any person other than one of the attorneys involved in the trial and then not in the presence of any other party. You will be under these instructions until the case is finally concluded.

(Thereupon, the witnesses retired from the courtroom.)

(Mr. Foster) I would like to have Mr. Burroughs.

[fol. 48] BOBBY W. BURROUGHS

DIRECT EXAMINATION

By Mr. Foster:

Q. Would you state your name and address, please. A. Bobby W. Burroughs, 606 East Fourth Court, Panama City, Florida.

Q. What is your occupation. A. I'm a sergeant, Panama City Police Department.

Q. Are you familiar with the business known as the "Book Mart" located at 19 Harrison Avenue, Panama City? A. Yes, I am.

Q. Have you ever been in that establishment? A. One time, yes, sir.

Q. Mr. Burroughs, I hand you three articles and ask you can you tell us what they are and identify them. A. This is three books that I purchased from this book store at 19 Harrison Avenue, at 5:30 P.M., on the 19th of March, 1970.

Q. And would you read us the title of those. A. "Sun Youth," Volume 1, Number , "Auto-fellatio and Masturbation," and "Double Up."

Q. How long were you on the Book Mart premises Mr. Burroughs? [fol. 49] A. For approximately five minutes.

(The Court) Who did you purchase them from?

(The Witness) The gentleman sitting down here in the dark coat.

Q. (Mr. Foster continuing) Do you know his name? A. I don't know his name personally.

(Mr. Shimek) Cantley.

(The Court) All right.

Q. Did you buy all those books on the premises, Mr. Burroughs? A. Yes, sir, I did.

Q. I said did you buy all the books that he had in stock. A. I bought these three books on the premises. I misunderstood your question.

Q. But did you buy all the books that he had displayed for sale? A. No, sir.

Q. How would you describe the number of books he had displayed for sale, Mr. Burroughs? A. It would be hard to say how many books was in there. I think I would be safe in saying that I could nothing like haul them off in my pickup.

Q. There were a great number of books for [fol. 50] sale? A. Yes, sir, a great number of books.

Q. Mr. Burroughs, generally what type of books were offered for sale or available to display for sale? A. This is the type book that pretty well generalizes as far as the big cover magazines goes, in my opinion, in there. And there was numerous what we call —

(Mr. Shimek) Objection, Your Honor. I move to strike anything that he gives as his opinion. Like only response to the question as to his personal observation.

(The Court) The objection is sustained.

(Mr. Foster) Your witness, Mr. Shimek.

(Mr. Shimek) I have no questions.

(The Court) Did you offer those in evidence?

(Mr. Foster) No, sir, but I will.

(The Court) These are 4, 5, and 6.

(Mr. Foster) David Ballou. (phonetic) Your Honor, Mr Ballou is one of the Defendants and I call him as an adverse witness.

[fol. 51]

CLAUDE D. BALLOU

DIRECT EXAMINATION

By Mr. Foster:

Q. Mr. Ballou, would you state your name and residence, please. A. Name is C. D. Ballou, Claude D. Ballou, and I'm living in the apartments, J-202. I'm not even familiar — let me check the apartment name. (Referring to wallet) Landmark Apartments.

Q. What is your occupation? A. I'm a book store clerk.

Q. And where do you work? A. I've been working for the past week at 19 Harrison Avenue.

Q. The Book Mart? A. The Book Mart, yes, sir.

Q. Who are you working for there for, Mr. Ballou? A. Mr. Robert Mitchum.

Q. In the response to a subpoena duces tecum did you bring certain magazines before the Court this afternoon? A. I did, sir.

Q. Did you bring a copy of each magazine on the book store premises as directed by the subpoena duces tecum? [fol. 52] A. I brought what I was instructed to bring by my lawyer. He said bring what I can carry since as you've admitted there is numerous copies of all types of magazines there. I brought the representations of these as best I could.

Q. And is the reason that you did not bring a copy of each one of them was on the advice of your counsel? A. This too, yes, sir, since I didn't have a truck to haul them in.

(Mr. Shimek) May I interrupt just for the record, Your Honor?

(The Court) Clinton, I don't believe you knew about it. Mr. Ballou called me in an effort to get a hearing for the week in connection with having to bring everything there and I told him that for the purposes of this hearing that I didn't feel that we would require that everything in the book store be brought. On a temporary hearing of course you're not required to prove your case conclusively as you are on final hearing. So for that reason I may be myself responsible for not having the witness produce a copy of everything in his store. It would be extremely burdensome, short notice, and this type of thing.

(Mr. Foster) Yes, sir, it would be extremely burdensome, but if it is for his own protection because when a copy of each magazine is before the Court and the Court has [fol. 53] an opportunity to review this — these magazines, then his constitutional rights will be protected. And that is the reason that I had the subpoena duces tecum specify a copy of each magazine.

(The Court) You have protected him in that respect adequately.

Q. (Mr. Foster continuing) Mr. Ballou, what type magazine or book does the Book Mart sell with reference to the nature or content of the magazines or books?

(Mr. Shimek) Your Honor, I would suggest that the books speaks for themselves. Any comments by the person who sells them or distributes them without opportunity to talk to counsel as to proper responses can lead to disastrous results. For instance, it may be a Fifth Amendment problem which I haven't had an opportunity to talk to him, and I've never met him until just this moment. He may very well say, "Yes, this affronts community standards or it is offensive or it is obscene."

(The Court) Are you making a speech for the benefit of the witness?

(Mr. Shimek) No, no, Your Honor, I'm sorry. But the point is he should not be required to respond. The best evidence is the material themselves and other witnesses. I would invoke the Fifth Amendment for his protection because I've never talked to him and I have no idea as to his expertise [fol. 54] on giving an opinion.

(The Court) The objection is overruled.

Q. (Mr. Foster continuing) Mr. Ballou, with nature to content, what kind of books or magazines do you sell at the Book Mart? A. You're asking for an opinion, sir?

Q. No, sir, I'm asking you for -- to describe them. What kind of material is it? A. I really am not qualified to do so, sir, because I don't read the material. I haven't read the material.

Q. Some of it you can tell the contents of it by the title and the covers, can't you, Mr. Ballou? A. It doesn't suggest anything to me other than it's adult type literature, sir.

Q. Mr. Ballou, this is a magazine entitled "Femme and Figure", Number 18. Is this one of the magazines that you brought to Court this afternoon in response to the subpoena duces tecum? A. From all appearances, yes, sir.

Q. I'm going to hand you a series of magazines and ask you to look at them. I'll identify them, then when we finish identifying them I will ask you a similar question. This is "Escape"? "Nude Escape, Number 2." A. (Witness examining)

Q. "Girl Friend, Number 1." [fol. 55] A. (Examining)

Q. "Jay Bird Scene, Number 3." A. (Examining)

Q. The Jay Bird Ero, Number 2." A. (Examining)

Q. "Garter Girls, Volume 3, Number 6." A. (Examining)

Q. "Scandia, Number 10." A. (Examining)

Q. "Young Men at Home and Play." A. (Examining)

Q. "Informal." A. (Examining)

Q. "Erotique, Volume 1, Number 1." A. (Examining)

Q. "Kitty, Number 1." A. (Examining)

Q. "Aloha, Volume 1, Number 1." A. (Examining)

Q. "Sisters." A. (Examining)

Q. "Beaver Colorama, Volume 1, Number 1." A. (Examining)

Q. "Vision, Number 2." A. (Examining)

[fol. 56] Q. "Twin-Pak." A. (Examining)

Q. "New Cover Girl." A. (Examining)

Q. "Exclusive Encores." A. (Examining)

Q. And "Exciting." A. (Examining)

Q. Did you produce all those books pursuant to the subpoena duces tecum? A. They look like the ones, yes, sir. I picked the magazines at random to represent what was in the store, so -

Q. Were you told any particular titles to pick? A. No, sir, I wasn't. He said pick a representation and I went through the shelves at random.

Q. You sell at this store glossy-paged magazines of the pictorial type such as "Twin-Pak" that I'm holding before you? A. That looks like one of the copies, yes, sir.

Q. Do you also sell paperback book material, what we commonly call a paperback book? A. Yes.

Q. Is the vast majority of the material that [fol. 57] you sell in your store and have displayed for sale in your store of the type of the "Twin-Pak" that I have showed you a moment ago? A. (Examining)

Q. Of that variety? A. The vast majority I couldn't say, sir. I do say the magazine represents a series that would be in the store, yes, sir.

Q. And where exactly in the store did you get these magazines from? A. Well, you mean how did I go about pulling the literature?

Q. Yes, sir. A. I just went down the shelves at random picking -

Q. What shelves? A. The shelves these magazines came from were on the right of the store as you go in.

Q. And is that a display rack? A. Yes, sir.

Q. Were these magazines on the display rack for the purpose of selling them? A. They were on display for the purpose of selling them.

Q. Okay, sir. How long have you been at the [fol. 58] Book Mart premises, Mr. Ballou? A. One week today, sir, this afternoon.

Q. During that week have you sold magazines to customers that came into the store? A. Yes, sir, I've been the clerk in the store for the past week.

Q. Have you sold a magazine similar to the type that I have named, and you have identified as being produced pursuant to the subpoena? A. I would say so, yes, sir.

Q. How many would you estimate that you have sold, Mr. Ballou? A. I have no idea, sir.

Q. Do you know what your gross receipts have been for the past week? A. I do not, not offhand. I could probably total them and tell you.

Q. Do you know what your gross receipts average for a day? A. I really don't.

Q. Do you know whether or not you sell more or less than 25 of these magazines a day?

(Mr. Shimek) Your Honor, I object to this line. The number of magazines that he might sell, presumptively taken material, there having been no determination of something [fol. 59] obscene, I think it has no relevance. He could sell 10, he could sell 200. I fail to see how it could be material and relevant and move that it be stricken on that ground.

(The Court) They're all offered for sale; are they not, Counsel?

(Mr. Shimek) Yes, sir, they're all available.

(The Court) I don't think you can go any further, Mr. Foster.

(Mr. Foster) Your Honor, I move the Court that these magazines be introduced in evidence.

(Mr. Shimek) Your Honor, I object to the introduction in evidence on the ground that they have been a seizure, taken from our possession, have not been paid for, and this constitutes a seizure by the abuse of the court process and I submit that it is not admissible in evidence for any purpose as long as it has to do with not having been purchased or properly procured.

(The Court) The motion will be denied. Does Counsel object if we mark all these as one composite exhibit? They are identified in the record.

(Mr. Shimek) I have no objection, Your Honor.

(The Court) Save a lot of time and trouble.

(Mr. Foster) That's all.

(Mr. Shimek) Will you come have a seat.

(Mr. Foster) Like to call Tom McAuley.

[fol. 60] (The Court) Counsel, did you have the last witness sworn?

(Mr. Foster) I don't —

(The Witness) (Mr. Ballou) No, sir.

(The Court) All right, take the stand again and we'll go back through it, unless counsel will agree that he be sworn and he testified —

(Mr. Shimek) I will stipulate that what he testified to may be substituted as though it were sworn testimony.

(The Court) This agreeable with the witness?

(The Witness) Yes.

(The Court) All right.

[fol. 61]

THOMAS J. McAULEY.

DIRECT EXAMINATION

By Mr. Foster:

Q. Will you state your name and occupation. A. Thomas J. McAuley, Chief of Police, Panama City, Florida.

Q. Are you familiar with the premises located at 19 Harrison Avenue, Panama City known as the Book Mart? A. Yes, I am.

Q. Have you ever been in the establishment? A. Yes, I have.

Q. On how many occasions? A. Probably altogether eight or ten occasions.

Q. And have you been in there in the store since February 28, 1970? A. Oh yes.

Q. How many times have you been in since that date if you know, Mr. McAuley? A. Eight or ten, approximately.

Q. What sort of wares or merchandise - what is 19 Harrison Avenue used for? What kind of business is carried on there? A. The name of the business is the "Panama City Book Mart."

[fol. 62] Q. What kind of business is conducted there? A. Dirty books.

Q. Would you tell us or describe the type books that are being sold there? A. Well, the ones I've seen, and I've seen most of them, are what I would consider to be obscene or pornographic type books. Most of the - as you go in the front door most of the wall on the right hand side and the rear walls are covered with magazine types, most of the wall on the left is covered with what we might term pocket book type.

Q. And on the magazine type, what kind of magazines are they? A. Magazines depicting people in all sorts of postures and poses and undressed, suggestive poses, indecent poses. Male and female, female and female, male and male. Variety of combinations.

Q. Would you look through Exhibits 1 through 6, Mr. McAuley. A. (Witness examining exhibits)

Q. Have you seen any of those magazines previously, Mr. McAuley, or any similar to those? A. I have seen all these previously and I've seen many similar to them.

Q. Did you state your occupation? A. Chief of Police.

[fol. 63] How long have you been in Panama City? A. Since June 27, 1961.

Q. Do you know whether or not the general public is aware of the operation of Panama City Book Mart? A. I think it's —

(Mr. Shimek) Objection, Your Honor. Has no relevance. We all know it exists. We've admitted that. He's giving opinion evidence and it's not material.

(The Court) You might ask him in regard to what the location in the city is. What does it pose to the public —

Q. (Mr. Foster continuing) Could you tell us where it's located, Mr. McAuley? A. Located 19 Harrison Avenue which is the main street of town, approximately half a block from the city hall. It's approximately I would say about two and a half blocks from the police department.

Q. If you know, Mr. McAuley, tell us what the attitude of the people of this area generally is with reference to the Book Mart.

(Mr. Shimek) Objection, Your Honor. There is no indication that he knows what that attitude is. He hasn't laid a proper predicate and I would object to it.

(The Court) You'll have to go into it, Counsel. How many people have you talked to, Chief? In [fol. 64] connection with the operation of the Book Mart in the last two or three weeks or since it's been in operation?

(The Witness) I would estimate that I have talked to or have had people talk to me concerning that operation probably, oh, 150, maybe 175 people all together?

(The Court) Over what period of time?

(The Witness) Over the past five or six weeks, I would say.

(The Court) Any particular location in the community or were they scattered throughout the community?

(The Witness) Just all kinds of people, Your Honor. Not any particular location or particular type, just a variety of people, of all levels, both colors.

(The Court) All right, Counsel, you may proceed.

Q. (Mr. Foster continuing) Did these people express to you their attitudes, or their attitude toward the Book Mart or its activities?

(Mr. Shimek) Your Honor, I would object on the ground of its being hearsay. People don't like something, whether it's Communist or murder, the mere fact they don't like it or somebody talks about it is strictly hearsay and has nothing to do with the standards that are here before the Court.

(The Court) The objection is overruled.

[fol. 65] (The Witness) Yes, they have. Many of them. In fact most of them expressed violent objection to that book store being here. A few other make some comment, "Well, you're still spending all your time at the book store," or something like that. But the majority of them have expressed to me, the ones I have discussed it with or have come to discuss it with me have expressed their violent objection to it

being here. They don't like it, they don't want it, they want to know what can be done, how they can help, and so on and so forth.

Q. (Mr. Foster continuing) Did they state their reasons?

A. Sure they state their reasons.

Q. What reasons do they state? A. Many of them express -

(Mr. Shimek) Without being facetious and I beg the Court's pardon, I object to "violently".

(The Court) You have a continuing objection to his testimony.

(Mr. Shimek) Thank you. Let the record reflect a continuing objection. Thank you.

(The Witness) Many of the reasons that were stated to me that was concern on their part for their children and this community in general.

Q. (Mr. Foster continuing) Has any particular thing or activity taken place in the immediate proximity of [fol. 66] the Book Mart, Mr. McAuley? A. Yes, several things. One of the first ones is the fact that there is a revival tent right across the street that has been there for some two weeks now with quite extensive attendance to that, almost nightly. Secondly, there are almost daily pickets in that area displaying signs saying "Concerned Mothers" or "Concerned Parents". Thirdly, with regard to the establishment itself we've had some gas bombs, bottled gas, gasoline bombs, thrown into the building which fortunately didn't explode. Those are some of the things that have occurred.

Q. Mr. McAuley, do you know of this community's standards as to morality or decency? A. I think that I do.

Q. And what is the basis of this? A. The basis of it would be the years that I've been here, the number of people that I'm acquainted with. My business in particular puts me in a

peculiar position to — I think, to make a legitimate evaluation of that sort of thing.

Q. Generally, Mr. McAuley, would you say that the books that are being sold or offered for sale —

(Mr. Shimek) Objection as being leading, Your Honor.

(The Court) Sustained.

Q. (Mr. Foster continuing) Mr. McAuley, are [fol. 67] the books and merchandise being sold at the Book Mart at 19 Harrison Avenue, Panama City, Florida, above or below the standards of the community general as to morality and decency? A. Far below their standard as to morality and decency.

(Mr. Foster) Your Witness.

CROSS EXAMINATION

By Mr. Shimek:

Q. Chief, you talk about children, have you ever seen a child in that place? Yes or no. A. No.

Q. You've had your police constantly survey it, haven't you. A. I haven't had my police constantly survey, I've had my police survey quite a bit of the time.

Q. Most of the time that it's open. A. Most of the time.

Q. All right, have they ever turned in a report that a child had gone in there and purchased something? A. They have not.

Q. As a matter of fact children are prohibited, isn't that statement true? [fol. 68] A. I believe it to be so.

Q. Has there been anyone that ever reported to you that their privacy for some reason has been invaded by Mr. Cantley or by Mr. Ballou? A. No.

Q. Has there been any pandering? Has anyone forced upon any person in this county to your knowledge this material, forcing them to buy, requesting them to buy, or annoying them to buy, or anything like that? A. Not to my knowledge.

Q. Now, you say there's a lot of people in attendance out there. This is a religious rally, I take it, a revival. Is that what you stated? A. Yes.

Q. Would you recognize it, sir, as an expression of the First Amendment, right to freedom of religion and expression? A. Yes, I think so.

Q. Why haven't you done something about the religious congregation and activity? A. Because of the fact that the man that is conducting that religious activity or revival, before starting his operation he approached the city commission at a regular meeting, he explained of what he wanted to do, and—

Q. What did he want to do? [fol. 69] A. To conduct a revival.

Q. All right, go ahead. A. At the corner of Beach Drive and Harrison Avenue.

Q. All right. A. He told them that it would be a tent and he told them when he would like to get started and he wanted to know if there was anything that he had to do in terms of applying for a license or permit and so on. And then he asked for the more or less asked for the permission from the commission and it was granted.

Q. Fine. So what's his name? A. Reverend Hunt.

Q. So the city granted Reverend Hunt a license, didn't they. A. No.

Q. Or they granted him a permit. A. They gave permission for him to conduct such a revival.

Q. Is it a temporary permit? I mean 20 days, 30 days? A. No, actually there was no time limit specified.

Q. Oh, an unlimited permit. A. Um hum.

[fol. 70] Q. Is that right? A. I don't recall any time limit being specified.

Q. Are you aware that this same city gave the book store an unlimited license? A. I don't think this city gave this book store an unlimited license.

Q. Do they have limited license? A. I think anybody has a limited license.

Q. All right. A. Depends on what he does with it.

Q. Do you have any knowledge as to whether or not that license has been revoked? A. It has been revoked.

Q. And do you know what the reason for its being revoked was? A. Yes, I do.

Q. What was it? A. Well, first there are two reasons. First of all, he's running an illegal operation, or it was considered that he was running an illegal operation. Secondly - I want to answer your question if you'll let me. Secondly, the man obtained a license under false pretenses in the first place.

Q. Now have you made charges against him to verify your accusations in this Court today? [fol. 71] A. Yes.

Q. You have filed criminal proceedings or municipal proceedings charging him with the fraudulent procuring of a license? A. No. I have not.

Q. Has anyone? A. Not to this date.

Q. As a matter of fact, the license was yanked by one of the Defendants in the case in the Federal Court. Isn't that so? It appeared in Tallahassee? A. Mr. Wilxoc, that's correct.

Q. That under the instructions of the city manager or the mayor or one of the higher officials. Isn't that correct? A. That's correct.

Q. And the reason was they thought the books that were selling were obscene. Is that correct? A. That's part of the reason I'm sure.

Q. You have subsequently been advised that every bit of that material has been returned because there was no judicially supervised adversary hearing, isn't that so? A. Say that again?

Q. All this material was returned and he was permitted to continue business because there had been no hearing as to the seizures and as to the arrest. Isn't that so. [fol. 72] A. Well, not exactly, no. That's not exactly so. The reason the material was returned was because of the attorneys that the city has employed thought it advisable. Thought it best to do so. We took their advice.

Q. Would you have knowledge if the Court said it would issue an injunction if they didn't? A. The Court didn't tell me anything like that. I don't know. Maybe they did.

Q. Now in any of these magazines have you seen anything showing sexual activity? A. I don't see any sexual contact, if that's what you mean, but—

Q. All right — A. Let me finish. I see plenty to suggest sexual activity about to take place, just having taken place, and I see plenty to indicate perversion.

Q. What do you mean "perversion"? A. I mean acts of fellation for instance.

Q. What do you mean by "fellatio"? A. I mean a man's penis being placed into a woman's mouth.

Q. Um hum. A. Or a man about to commit cunnilingus on a woman.

Q. All right. [fol. 73] A. Among other things.

Q. Let's stop right here. Perversion you've described particularly fellatio and you're talking about cunnilingus and the oral genital contact. That's what you're saying, isn't it. A. When it's displayed like this, that's exactly what I'm saying.

Q. And do you have such oral genital contact? Let me see it. A. I didn't say you had contact. I said about to take place or appearing to just having taken place.

Q. Isn't this really a conclusion on your part, sir? A. Yes, it is a conclusion.

Q. It might very well be exactly what it shows, a picture of the genitalia? A. No.

Q. Or with something else. A. You asked me if it was a conclusion and it is, on my part.

Q. All right. Now, the picketing that's going on down there, you recognize that also as a freedom of expression, don't you. A. Yes.

Q. Now, you're not indicating to this Court [fol. 74] that because people who are exercising their right of picketing, because people who are exercising their right to have a revival that this suddenly creates such a situation that the man exercising his rights to sell material is creating the nuisance, are you? A. (No response)

Q. Which one is creating the nuisance? The picketing, the revival, or the selling? A. It's pretty obvious.

Q. What is it? Tell me. A. Were it not for the book store being there you and I both know that the other two would probably not be taking place.

Q. So it would be your desire, I take it, to remove or extricate one of the three, namely the book store. Isn't that right? A. Specifically the book store.

Q. And that's what you want to do, isn't it? A. Yes, I do. Yes, I do.

Q. And you haven't been able to do it so far in any court, have you. A. Not so far.

Q. Sir, would you say that many of these books depict a collection of young women demonstrating clearly their genitalia exposed? [fol. 75] A. That's part of what they display. Some of them, not exactly young women. Some of them are fairly young, some of them are not so young.

Q. Would you say that the camera is focused searchingly on the rectal or the penis or the genital area? A. Yes, many instances it is.

Q. And you consider this obscene. A. Yes, I do.

Q. What I'm concerned about, sir, is what you consider obscene and whether or not you're able to be in a position to tell this Court what is obscene. Let me read to you from the Supreme Court opinion which I have just already asked you. And ask you if you've heard about this. This is Judge Haynesworth speaking and he says that—

(Mr. Foster) Your Honor, I object to this line of questioning. The Supreme Court decisions speak for themselves.

(The Court) The objection is sustained. Don't argue your case, Counsel, in the guise of asking questions of the witness.

(Mr. Shimek) Okay.

Your Honor, I would move to strike the testimony of this witness as on the grounds that everything he has stated as far as standards are concerned are hearsay. There is no proper predicate laid that he in fact knows what the [fol. 76] standard is and I mean a statewide standard or a national standard because what we have here it is a First Amendment, an amendment to the constitution of national breadth and

there's no indication that he has any idea what the standards of the community, namely the national or the state community, is. Further, he has not testified as to whether his opinion and based upon a predicate whether or not "has a redeeming social value or any of the other elements that are required to be testified to before an opinion can be given to determine if something is in fact obscene legally.

So I would respectfully move that his entire testimony be stricken as it would relate to the question of whether or not something is obscene.

(The Court) Have you finished your cross examination?

(Mr. Shimek) I'm sorry. Yes, Your Honor.

(The Court) All right. The motion is denied. Call your next witness.

(Mr. Foster) Like to call Mr. Cantley as an adverse witness.

(The Court) What you want to prove by him? Counsel might agree with you.

(Mr. Foster) I was going to ask him a couple of questions concerning whether or not there were any criminal proceedings pending against him in Bay County accusing him of [fol. 77] selling obscene material.

(Mr. Shimek) I imagine he could - But I think that's totally irrelevant, Your Honor.

(The Court) In the event it's material you will agree that he could introduce copies of a record.

(Mr. Shimek) Oh yes, certainly. I mean I hope we're not adding guilt by association. Been no conviction of a crime.

(The Court) I'm going to ask Clinton why some of these cases have not been tried, some of the criminal cases.

(Mr. Foster) Asking why they haven't been tried? >

(The Court) Just as a matter of information.

(Mr. Foster) As a matter of information, there are two reasons. One is that the cases are of relatively recent origin. One was made the 24th day of March, one was made the 13th of March, one made the 28th day of February. And in the normal course of events these cases would not even be called up for trial until the latter part of this month.

The second reason being that the constitutionality of 847.011 is presently in the bosom of the federal court. The judge has threatened to enjoin me if I proceeded, and up to this point I haven't been put in the position of having to say - setting for trial. They probably won't be set for trial until the 14th of April, which is a week from next Tuesday.

(Mr. Shimek) May I add one thing as an officer [fol. 78] of the Court, Your Honor. I represent to this Court that if he tries to try a case before 15th of June that an injunction will issue from Judge Arnove.

(The Court) Well, this is up to—

(Mr. Shimek) Yes, sir, but you wanted to know why. He can't do anything about it.

(The Court) I'm not familiar with this matter other, as I told you, from what I've seen in the newspapers and that's the reason I was asking.

(Mr. Shimek) I speak as an officer of the Court in representing that view.

(The Court) He agreed that you may introduce copies of any criminal record in the event they're material.

(Mr. Shimek) If you'll announce what they are,

(The Court) In the event they're material.

(Mr. Shimek) Yes.

(The Court) Do you have any further evidence to offer, Counsel?

(Mr. Foster) With this reservation, Your Honor, I will rest and it is my understanding of the law that in cases of—

(The Court) Before we get on the law let's find out if we have any evidence from the Defense.

(Mr. Shimek) No.

(Mr. Foster) I am resting on this basis, that [fol. 79] it is my understanding of the law—

(The Court) Now just a minute, Counsel, you're not going to have any conditional rest. You're either going to rest or not rest.

(Mr. Foster) I'll rest.

(The Court) Mr. Shimek, do you have any evidence?

(Mr. Shimek) I have nothing to rebut, Your Honor.

(The Court) I assume you gentlemen in these legal rounds you've been having have briefed rather extensively the question of what is and what is not appealing to the prurient interest, what is and is not obscene. I don't propose at this time of day after having worked a full schedule to sit here and look through all this stuff and render a decision immediately. I will render one by Monday morning. I would like it if you're able at this time to give me copies of any brief that you may have filed elsewhere defining those terms. That's what I am primarily concerned about. I understand the

Supreme Court of the United States has made several definitions. I'm familiar with any idea of what is obscene and what appeals to pruxient interests but that is immaterial in this case and I would like to know what the law is. If you have it. If you don't I'll have to look it up myself.

• (Mr. Shimek) Your Honor, I happen to have a couple of cases which I could leave with the Court,

[fol. 80] (The Court) Do you have any, Clinton?

(Mr. Foster) Yes.

(The Court) All right, if you have no further proof why don't we go into chambers and you can give me these citations. I'll take the whole works with me.

(Mr. Shimek), Your Honor, will you permit me now to read into the record as you indicated you would earlier my objection to the constitutionality?

(The Court) Yes. I'll say this, Mr. Shimek, if you overlook anything between now and Monday you can put it in.

(Mr. Shimek) Thank you, Judge.

Your Honor, we object to the hearing on the basis that Section 823.05 is unconstitutional on its face for the following reasons:

The statute fails to describe the standards which will determine what "tends to annoy the community or injure the health of the community" or what standards determine what will "become manifestly injurious to the morals or manners of the people as described in the statute.

Secondly, the procedure outlined in the statute does not provide for the necessary sensitivity to freedom of expression

in that it does not provide for a prompt judicial declaration of what a nuisance is and there are no provisions for the postponement of the abating itself [fol. 81] prior to a final searching determination of what is a nuisance resulting therefore in an insensitive procedure which chills the right of free expression.

The procedure itself exerts considerable informal pressure on all retailers of presumptively protected material to withdraw objectionable material from their newstands and this constitutes a prior restraint, which is impermissible under *Bantam Books*, a case which I will cite later, Supreme Court case.

(The Court) Are you going to submit all of that? You going to read the whole—

(Mr. Shimek) Just a page.

(The Court) Oh, all right.

(Mr. Shimek) Next, the standard of nuisance in the statute does not include anywhere the requirement that presumptively protected material be obscene before it may be enjoined. The statute doesn't provide in the definition of abating a nuisance involving presumptively protected material as we have here today; that the material (1) must appeal to the prurient interests, (2) that it must be patently offensive, thirdly be utterly without redeeming social value, (4) that there must be evidence of pandering or invasion of privacy or children involved.

Next, the statute permits no imposition of restrictions upon the power of the police to arrest those [fol. 82] colorably exercising First Amendment rights.

Section 823.05 and Section 60.05 in combination, or singularly lends itself to a substantial number of impermissible applications and are void on their face for vagueness and

overbreadth. The area of impact of these two statutes, Your Honor, is the area which substantially involves First Amendment rights. The conduct which is affected by these statutes is to a substantial extent the kind of expressive and associational behavior which at least has a colorable claim on First Amendment rights.

The statutes in combination are unimpeded by the availability of judicial techniques for excising speedily and effectively the potential bad applications of an overbroad law.

And lastly, the statutes acting in combination and singularly are facially vague and suffer from a lack of fair warning to the actors involved, suffers from lack of adequate standards to guide enforcement agents, fact finders, and Courts on the question of what is a nuisance under these particular circumstances.

That will be my objection to the constitutionality.

(The Court) I think you've covered the grounds rather adequately, Counsel.

(Mr. Shimek) Thank you.

(The Court) Let's retire to chambers and you [fol. 83] can give me the authorities.

* * * * *

HERE ENDED THE PROCEEDINGS

[fol. 84] Certificate of Service (Omitted in Printing)

[fol. 85]

In the Circuit Court, Fourteenth Judicial Circuit
Of the State of Florida, In and For Bay County

(70-292(B))

April 6, 1970, 8:37 A.M.

State of Florida, Plaintiff,

v.

Robert Mitchum, et al., Defendants.

ORDER

THIS CAUSE came on for hearing upon plaintiff's application for a temporary injunction pursuant to Chapter 60.05 Florida Statutes, and the Court has considered plaintiff's sworn complaint, heard the testimony of plaintiff's witnesses, and has considered the magazines received into evidence and has heard argument of counsel for plaintiff and defendants and finds as follows:

1. This Court has jurisdiction of the subject matter hereof and the parties hereto except the defendant, CLARENCE HOWARD CANTEY, on whom no return of process has been filed, however, the Court notes that the defendant Cantey was present before the Court and therefore had actual notice of this hearing.

2. That during the time herein material, the defendant, ROBERT MITCHUM, was and is the owner of the business known as "THE BOOK MART", located and operated at 19 Harrison Avenue, Panama City, Florida, and the defendants,

CLARENCE HOWARD CANTEY and DAVE BALLUE, are employees, agents or servants of Robert Mitchum and operate, maintain or carry on The Book Mart business at 19 Harrison Avenue, Panama City, Florida.

3. That on March 19, 1970, the magazines AUTOFELLATIO AND MASTURBATION, DOUBLE UP and SUN YOUTH, Vol. 1. No. 4, were sold by the Book Mart at 19 Harrison Avenue, Panama City, Florida; and that on March 24, 1970, the magazines ROULETTE, [fol. 86] Vol. 3, No. 4, THE SPECIAL, No. 4, and A STUDY OF GROUP SEXUAL PRACTICES, ILLUSTRATED CASE HISTORIES, Vol. 1, No. 1, were sold by The Book Mart at 19 Harrison Avenue, Panama City, Florida.

4. The Court has carefully and thoroughly reviewed the six magazines named above and finds that said magazines prominently and morbidly display the pubic and anal area of the human body. That said magazines show nude males and females in a variety of suggestive positions with morbid attention focused on the genitalia. They show nude males and females in postures and positions which clearly and without doubt suggest that natural, unnatural, perverted or homosexual sex acts have or about to occur. The printed matter in these six magazines, if any, is predominantly devoted to describing matters relating to sex by the constant use of four-letter words of the most vile and vulgar variety, describing sex acts, sex functions, and the genitalia. The sex in these magazines is clear, strong and inescapable.

5. The Court concludes that each of the above named magazines are obscene; that their dominant theme, when taken as a whole appeals to prurient interest, in that their main and only attraction ary for those who are perverted, or are morbidly or abnormally curious about sex. The Court further concludes that they have no redeeming social value

and are patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters.

6. On the basis of evidence submitted, this Court concludes preliminarily that the defendants' objective at 19 Harrison Avenue, Panama City, Florida is the selling of obscene, lewd and indecent material for profits (the court notes the apparent exorbitant prices at which these publications are offered for sale), to paying customers who have a perverted, abnormal or morbid sexual curiosity and erotic appetite. That the activities of the defendant at 19 Harrison [fol. 87] Avenue, Panama City, Florida are prima facie, injurious and damaging to the morals and manners to the people of the State of Florida and are prima facie subversive to public order and decency and prima facie constitute a public nuisance. Plaintiff has demonstrated prima facie irreparable harm and damage to the morals and welfare and safety of the people of the State of Florida.

7. That unless enjoined by this Court, the activities and conduct of the defendants at 19 Harrison Avenue, Panama City, Florida will continue and a temporary injunction should issue.

8. This Court is mindful of the important 'First Amendment rights of the defendants under the United States Constitution and for the protection of those rights, this cause will be given a top priority in this Court's schedule and a final adjudication will be expedited in any manner the defendants may reasonably request.

9. It is upon consideration thereof.

ORDERED:

1. That the defendants, Robert Mitchum, Clarence Howard Canteley and Dave Ballue and their agents, employees, servants, grantees, assigns and successors be, and they are hereby enjoined from operating and maintaining any business on the premise known as 19 Harrison Avenue, Panama City, Florida and they are further enjoined from removing any property or thing from or off the premise of 19 Harrison Avenue, Panama City, Florida until further order of this Court.

DONE and ordered within the Fourteenth Judicial Circuit of the State of Florida, this 6th day of April, 1970.

W. L. FITZPATRICK,
Circuit Judge

[fol. 88]

In The District Court of Appeal,
First District, State of Florida

Docket No. N-270.

Robert Mitchum, et. al., Appellants,

—vs.—

State of Florida, Appellee.

**MOTION TO REVIEW AN ORDER DENYING
MOTION FOR SUPERSEDEAS**

Come now the Appellants, Robert Mitchum, Dave Ballue, Clarence Howard Cantey, a business known as The Book Mart, a certain portion of land and building located at 19 Harrison Avenue, Panama City, Florida, and all other persons claiming any right, title or interest in the property affected by this action, in the above styled case and file this Motion and say:

1. On April 6, 1970, the Honorable W. L. Fitzpatrick, Circuit Judge, entered his Order enjoining the operating and maintaining of any business on the premises known as 19 Harrison Avenue, Panama City, Florida.

2. On April 7, 1970, this appeal was filed in the Circuit Court in Bay County, along with a Motion for Supersedeas pending argument on appeal.

3. On April 9, 1970, the Honorable W. L. Fitzpatrick denied said Motion.

WHEREFORE, Appellants move this Honorable Court to review Judge Fitzpatrick's April 9, 1970 Order of denial of Appellants' Motion for Supersedeas and move that this Court stay execution of the Judgment in this cause for a [fol. 89] period of ten days in order that Appellants might procure a Supersedeas Bond provided for by law with respect to such Interlocutory Appeal; and Appellants further move that this Court fix the amount of that bond.

PAUL SHIMEK, JR.,
Attorney for Appellants.

Certificate of Service (omitted in printing)

[fol. 90]

In The District Court of Appeal
First District, State of Florida
January Term, A.D. 1970:

Case No. N-270

Not Final Until Time Expires To File Rehearing Petition and Disposition Thereof If Filed.

Robert Mitchum, Dave Ballue, Clarence Howard Cantey, a business known as The Book Mart, a certain portion of land and building located at 19 Harrison Avenue, Panama City, Florida, and all other persons claiming any right, title or interest in the property affected by this action,
Appellants,

v.

State of Florida, Appellee.

Opinion Filed April 21, 1970.

An Interlocutory Appeal from the Circuit Court for Bay County. W. L. Fitzpatrick, Judge.

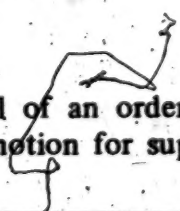
Paul Shimek, Jr., for Appellant.

Earl Faircloth, Attorney General; Raymond L. Marky, Assistant Attorney General, for Appellee.

**ON MOTION TO REVIEW ORDER DENYING
MOTION FOR SUPERSEDEAS**

SPECTOR, J.

Appellants seek review and reversal of an order entered by the trial court denying appellants' motion for supersedeas



pending determination of an interlocutory appeal to review an order entered against them by the trial court by which appellants are enjoined from operating and maintaining a business known as The Book Mart in Panama City, Florida. [fol. 91] F.A.R. 5.1 provides that the question of supersedeas pending interlocutory appeal is one within the sound discretion of the trial judge. F.A.R. 5.10 provides that where the lower court refused to grant a supersedeas or stay, as has occurred in the case at bar, the said refusal may be reviewed and overruled, modified or discharged by the appellate court if the order denying supersedeas is determined to be arbitrary or unreasonable or is for any other reason improper.

In the lower court's temporary injunction order, the following recitation appears:

"On the basis of evidence submitted, this Court concludes preliminarily that the defendants' objective at 19 Harrison Avenue, Panama City, Florida is the selling of obscene, lewd and indecent material for profits (the court notes the apparent exorbitant prices at which these publications are offered for sale), to paying customers who have a perverted, abnormal or morbid sexual curiosity and erotic appetite. That the activities of the defendant at 19 Harrison Avenue, Panama City, Florida are prima facie, injurious and damaging to the morals and manners to the people of the State of Florida and are prima facie subversive to public order and decency and prima facie constitute a public nuisance. Plaintiff has demonstrated prima facie irreparable harm and damage to the morals and welfare, and safety of the people of the State of Florida."

The above paragraph is preceded by findings which describe the nature of the materials submitted to the trial judge as being representative of the books and magazines being sold by appellants.

In view of the court's findings of fact and conclusions as above set out; it cannot be said that the lower court acted

arbitrarily, unreasonably or capriciously in denying appellants' motion for supersedeas pending this interlocutory appeal. The trial judge's denial of supersedeas fell well within the discretionary authority reposed in him by F.A.R. 5.1.

[fol. 92] Appellants having failed to demonstrate error in the order being reviewed, the motion for supersedeas is denied.

✓ JOHNSON, Chief Judge
RAWLS, J., CONCUR.



[fol. 93]

In The United States District Court
for the Northern District of Florida
Marianna Division

Marianna Civil Action No. 799
Filed: Apr. 30, 1970

Robert Mitchum, d/b/a
The Book Mart, Plaintiff,

—vs.—

Clinton E. Foster, et al., Defendants

ORDER

It appearing to the Court that several actions are presently pending in the Pensacola Division of the United States District Court for the Northern District of Florida, in which actions substantially the same Florida Statutes are alleged to be unconstitutional, it is

ORDERED that the above cause of action be transferred to the Pensacola Division of the United States District Court for the Northern District of Florida. It is further

ORDERED that further pleadings be filed in the Pensacola Division of the United States District Court for Northern District of Florida.

[fol. 94] **DONE** and **ORDERED** in Chambers in Tallahassee, Florida, this 30th day of April, 1970.

David L. Middlebrooks,
United States District Judge

[fol. 95] In the United States District Court
for the Northern District of Florida
Pensacola Division

Transferred from Marianna Civil Action No. 799
Filed: May 4, 1970

Robert Mitchum, d/b/a
The Book Mart, Plaintiff,

—vs.—

Clinton E. Foster, et al, Defendants.

NOTICE OF HEARING

PLEASE TAKE Notice that the Plaintiff, by his undersigned attorney, will call on the above styled cause for hearing upon the prayer in the complaint for a Temporary Restraining Order, restraining the Defendants from interfering with the opening of The Book Mart at 19 Harrison Avenue, Panama City, Florida, which closing allegedly is an unconstitutional prior restraint which has a freezing effect on First Amendment rights, and further restraining Defendants from enforcing any orders preventing the conducting of business thereat unless there is first held a prior judicially superintended adversary hearing declaring specific publications obscene before the enjoining of their sale, at 2:30 P.M. on Monday, May 11, 1970, before The Honorable Winston E. Arnow, in Chambers at the United States District Courthouse in Pensacola, Florida.

[fol. 96] PLEASE BE GOVERNED ACCORDINGLY.

I HEREBY CERTIFY that a true copy of the foregoing was furnished the above-named addressees by United States Mail this 1st day of May, 1970, A.D.

Paul Shimek, Jr.
Attorney for Plaintiff.

[fol. 97] In the United States District Court
Northern District of Florida
Marianna Division

Marianna Civil Action No. 799
Filed: May 11, 1970

Robert Mitchum, d/b/a
The Book Mart, Plaintiff,

—vs.—

Clinton E. Foster, et al., Defendants

MOTION TO DISMISS

COMES NOW the defendant, CLINTON E. FOSTER, as Prosecuting Attorney for Bay County, Florida and moves this Court to dismiss Plaintiff's complaint in the captioned matter because:

A. This Court lacks jurisdiction over the subject matter hereof.

B. This Court lacks jurisdiction over this defendant.

Respectfully submitted,

I DO CERTIFY that a copy hereof has been furnished by delivery to Hon. Paul Shimek, Attorney for Plaintiff, this 11th day of May, 1970.

Clinton E. Foster,
Prosecuting Attorney for
Bay County, Florida

[fol. 98] In the United States District Court
for the Northern District of Florida
Pensacola Division
Filed: May 11, 1970

Robert Mitchum, d/b/a
The Book Mart, Plaintiff,

—vs.—

Clinton E. Foster, et al, Defendants.

ORDER

ORDERED: Defendant's motion to dismiss is denied.

Defendants have fifteen (15) days from the date of this order within which to serve, and at the same time or immediately thereafter file, answer or other responsive pleading.

DONE AND ORDERED this 11th day of May, 1970.

Winston E. Arnow,
Chief Judge

In The United States District Court For the
Northern District Of Florida
Pensacola Division
Filed: May 12, 1970

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

v.

Clinton E. Foster, as Prosecuting Attorney of
Bay County, Florida, and M.J. "DOC"
Daffin, As Sheriff of Bay County, Florida,
Defendants.

[fol. 99]

TEMPORARY RESTRAINING ORDER

This cause came on to be heard on Plaintiff's application for temporary restraining order. Defendants filed motion to dismiss complaint which, after hearing, the Court denied.

Plaintiff seeks order restraining the Defendants from interfering with the operation of Plaintiff's business in Panama City, Florida, and from enforcing any orders preventing the conduct of such business without there being first held a prior judicially supervised adversary hearing declaring specific publications obscene before the enjoining of their sale.

On the undisputed facts before the Court, on March 30, 1970, Clinton E. Foster, Prosecuting Attorney for Bay County, Florida, filed in the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, hereinafter called Circuit Court, a complaint wherein he requested that Circuit Court to issue a temporary injunction without bond against the Plaintiff for the conducting or continuing of a nuisance and from removing or in any way interfering with or mutilating the furniture, fixtures, and [fol. 100] and movable

property including inventory used in the conduct of the business located at 19 Harrison Avenue, known as The Book Mart, Panama City, Florida. On April 3, 1970, pursuant to three days notice, a hearing was held wherein 25 publications were entered into evidence as exhibits before the Circuit Court. Six of the 25 exhibits presented were declared to be obscene by the Circuit Court. No determination as to the obscenity vel non of the other 19 Constitutionally presumptively protected publications was made. The order reciting the determination of obscenity of six publications was rendered on April 6, 1970, and in addition to the finding of obscenity of the six publications the Circuit Court found that the activities of the Plaintiff at 19 Harrison Avenue, Panama City, Florida, were prima facie, injurious and damaging to the morals and manners of the people of the State of Florida and were prima facie subversive to public order and decency and prima facie constituted a public nuisance. The Circuit Court issued a temporary injunction against Robert Mitchum, his agents, employees, grantees, assigns and successors from operating and maintaining any business on the premises known as 19 Harrison Avenue, Panama City, Florida, and enjoined Robert Mitchum and his agents, employees, servants, grantees, assigns and successors from removing any property or thing from or off the premises of 19 Harrison Avenue, Panama City, Florida, until further order of that court.

Plaintiff's motion for supersedeas pending determination of interlocutory appeal was denied by the trial court and also by the First District Court of Appeal of Florida.

[fol. 101] Before this Court, it is established by uncontroverted sworn complaint that Plaintiff sells, at this location, other materials besides those held obscene; at least on the record before this Court, that evidence was not presented in any of the state court proceedings held thus far. The state's action is brought and the state court's order entered in the suit seeking, under the Florida Statutes, abatement as a nuisance. Florida Statute 60.05 provides

"injunction shall not preclude the operation of any lawful business not conducive to the maintenance of the nuisance". The constitutional right of Plaintiff to sell material unless and until it has been determined obscene in a prior adversary judicial hearing, pursuant to due notice, is now well established. See, among others, *H M H Publishing Co., Inc. v. Oldham*, 306 F. Supp. 495 (M.D. Fla. 1969), and cases therein cited. Under principles enunciated in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and its progeny, the state court order here involved preventing operation of Plaintiff's presumptively lawful business does present irreparable harm and injury, and it appears to be the kind that, in this early stage in the state court proceedings, requires the action taken by this Court in this order. The attacks on the Florida Statutes involved as being unconstitutional are serious, and not frivolous.

Accordingly, it is

ORDERED:

1. Defendants, their agents, servants, employees and attorneys, and all persons acting under their direction and control, [fol. 102] or in active concert or participation with them, are hereby temporarily restrained from enforcing or seeking to enforce that certain order dated April 6, 1970, entered by the Circuit Court of the Fourteenth Judicial Circuit for the State of Florida, in and for Bay County, in the case styled State of Florida, Plaintiff, v. Robert Mitchum, et al., Defendants, being Case 79-292(B), except to the extent such order prevents the sale, on Plaintiff's premises referred to therein, of any material determined to be obscene in a prior adversary judicial hearing held pursuant to due notice.

2. This order shall become effective upon the filing by Plaintiff of a good and sufficient bond in the penal sum of \$1,000.00 approved by the Clerk of this Court, conditioned that Plaintiff shall pay to Defendants the amount of any

damage sustained by Defendants should it later be found this order was wrongfully issued. Unless previously revoked by the undersigned, this order shall remain in force only until the hearing and determination by the full court.

DONE AND ORDERED this 12th day of May, 1970.

Winston E. Arnow
Chief Judge

[fol. 103]

Form UDS-202
(Rev. 6-15-67)

RETURN ON SERVICE OF WRIT

FILED

United States of America

Northern District of Florida

MAY 11 1970

OFFICE OF CLERK
U. S. DISTRICT COURT
NORTH DIST. FLA.

ROBERT MITCHEM, d/b/a The Book Mart

Clerk's No. M. Civ. 799

U.S.
CLINTON E. POSTER, as Prosecuting Attorney
of Bay County, Florida, and M. J. "DOC"
DAFFIN, as Sheriff of Bay County, Fla.

U.S. Marshal's No. 3637

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~endeavored to serve~~ the annexed Summons & Complaint
served (Writ)
on the therein-named M. J. "Doc" Daffin as Sheriff of Bay County, Florida
(Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with (if endeavor—describe what was
done in endeavoring to serve) M. J. "Doc" Daffin
(Name of individual or agent of company, corporation, etc.)

MAY 13 1970

personally at (if endeavor—show addresses where endeavors made) OFFICE OF CLERK
Bay County Jail U. S. DIST. COURT, NOR. DIST. FLA.
(Address—Street number, apartment number, rural route, etc.) PENSACOLA, FLA.
Panama City, Florida in the said District
(City) (State)
at a.m.-p.m., on the 6th day of May, 1970

SERVICE NOT COMPLETED

Date _____

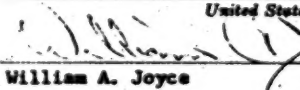
I hereby certify and return, that on the _____ day of _____, 19____,
I received the within _____ and that after
diligent search, I am unable to find the within named _____
_____ within said district.

Marshal's fees \$ 3.00

Mileage _____

ERNEST E. SHELLEY

United States Marshal.

By 
William A. Joyce

Deputy.

U.S. DIST. CT. - PENSACOLA, FLA.

[fol. 104]

RETURN ON SERVICE OF WRIT

United States of America

Northern District of Florida

FILED

MAY 11 1970

ROBERT MITCHELL d/b/a The Book Mart

Clerk's No. **M. Civ. 798**
OFFICE OF CLERK
U. S. DISTRICT COURT
NORTH DIST. FLA.

CLINTON E. FOSTER, as Prosecuting Attorney
of Bay County, Florida, and M. J. "DOC"
DAFFIN, as Sheriff of Bay County, Fla.

U.S. Marshal's No. **3637**

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~understand~~ ^{have} served the annexed **Summons and Complaint** (Writ)
on the therein-named **Clinton E. Foster**, as Prosecuting Attorney of Bay
County, Florida
(Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with (if endeavor—describe what was
done in endeavoring to serve) **Clinton E. Foster**
(Name of individual or agent of company, corporation, etc.)

FILED

personally at (if endeavor—show addresses where endeavors made)

MAY 13 1970

Bay County Jail

OFFICE OF CLERK
U. S. DIST. COURT, NOR. DIST. FLA.
PENSACOLA, FLA.
in the said District

Panama City, Florida

(City)

(State)

at **a.m.-p.m.**, on the **6th** day of **May**, 1970

SERVICE NOT COMPLETED

Date _____

I hereby certify and return, that on the _____ day of _____, 19____

I received the within _____ and that after

diligent search, I am unable to find the within named _____

within said district.

Marshal's fee \$ **1.00**

mileage \$ **24.00**

ROBERT E. SHELBY

United States Marshal.

By **William A. Joyce**

Deputy.

[fol. 105]

SUMMONS in a CIVIL ACTION

3637
MAY 4 8 22 AM

United States District Court

FOR THE

NORTHERN DISTRICT OF FLORIDA - PANAMA DIVISION

FILED

MAY 11 1970

OFFICE OF CLERK
U. S. DISTRICT COURT
NORTH DIST. FLA.

CIVIL ACTION FILE NO. 792

ROBERT MITCHELL; d/b/a The Book Mart,

Plaintiff

v.

CLINTON E. FOSTER, as Prosecuting
Attorney of Bay County, Florida, and
M. J. "Doc" Daffin, as Sheriff
of Bay County, Florida,

Defendant

SUMMONS

FILED

MAY 13 1970

OFFICE OF CLERK
U. S. DIST. COURT, NORTH DIST. FLA.
PANAMA, FLA.

To the above named Defendant s:

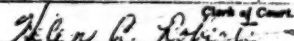
You are hereby summoned and required to serve upon Paul Shimek, Jr.

plaintiff's attorney, whose address

P. O. Box 661
Panama, Florida 32502

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

MARVIN S. WAITS


 Clerk of Court.
 Deputy Clerk.

Date: April 30, 1970

[Seal of Court]

[fol. 106]

May 13, 1970

The Honorable John R. Brown, Chief Judge
United States Court of Appeals for the Fifth Circuit
United States Courthouse
Houston, Texas

Re:

Robert Mitchum, d/b/a The Book Mart, v. Clinton E.
Foster, as Prosecuting Attorney of Bay County, Florida,
and M. J. "DOC" Daffin, as Sheriff of Bay County,
Florida - PCA 2224

Dear Chief Judge Brown:

In this suit, the constitutionality of Florida statutes is challenged, and judicial declaration of unconstitutionality is sought. There is also sought injunctive relief against the enforcement and execution of the statute and application is made for a three-judge court.

In my opinion, the constitutional issue raised is substantial.

Accordingly, as required by 28 U.S.C. §2284(1), I notify you of the foregoing, so that you may proceed with the designation of those to serve on the three-judge court in this suit.

This suit, like others presently pending in the Northern District of Florida in which three-judge courts have been convened, deals, generally, with Florida's obscenity and other related statutes. I suggest to you the procedure followed in these other cases should be followed, if at all feasible; and that is, appoint the same three-judge panel, so that this case may be considered along with the others. The three judges in the prior pending suits are Judge Bryan Simpson, Judge Charles R. Scott, and myself.

[fol. 107] I am mindful of your letter of April 30, 1970. As stated, the Florida Statute here under attack is the same obscenity statute that is being attacked in the other cases in this district in which this three-judge panel has been convened. In addition, there is challenged in this suit proceedings under which injunction is sought to abate the Plaintiff's operation under Florida's nuisance statute, and there is serious question in my mind whether that kind of statute can be held to apply to a situation of this kind.

Sincerely yours,

Winston E. Arnow

cc:

The Honorable Bryan Simpson
The Honorable Charles R. Scott
The Honorable D. L. Middlebrooks

[fol. 108] In the United States District Court
for the Northern District of Florida
Pensacola Division

Robert Mitchum d/b/a The Book Mart, Plaintiff,

—vs.—

Clinton E. Foster, et al., Defendants.

**\$1,000.00 CASH BOND FOR DAMAGE
FOR WRONGFUL ISSUANCE**

Filed: May 13 1970, 11:05 A.M.

KNOW ALL MEN BY THESE PRESENTS, that ROBERT MITCHUM d/b/a THE BOOK MART is held and firmly bound unto CLINTON E. FOSTER, as Prosecuting attorney of Bay County, Florida, and M. J. "DOC" DAFFIN, as Sheriff of Bay County, Florida, their executors, administrators or assigns, in the penal sum of One Thousand and 00/100 Dollars (\$1,000.00) lawful money of the United States of America, to be paid unto the said CLINTON E. FOSTER and M. J. "DOC" DAFFIN, their executors, administrators, or assigns, to which payment well and truly to be made, I do bind and oblige myself and my heirs, executors, and administrators, jointly and severally by these presents.

Sealed with my seal and dated this 13th day of May, A.D., 1970.

WHEREAS, the above-named ROBERT MITCHUM, heretofore a citizen of the State of Georgia commenced an action in the United States District Court, in and for the Northern District of Florida, Pensacola Division, against the said CLINTON E. FOSTER and M. J. "DOC" DAFFIN.

NOW THEREFORE THE CONDITION OF THIS OBLIGATION is such that if the above-named ROBERT MITCHUM in the said action shall pay on demand to the Defendants herein the amount of any damage sustained by said Defendants should it later be found that the temporary restraining order entered on May 12, 1970, by The Honorable Winston E. Arnow, Chief Judge of the above entitled Court was wrongfully issued, and Said \$1,000.00 deposited as surety for that purpose, then this obligation shall be void; otherwise the same [fol. 109] shall be and remain in full force and effect.

Robert Mitchum

APPROVED BY me as the Clerk of the above entitled Court this 13th day of May, 1970.

J. M. Crossgrove
Dept. Clerk, United States
District Court
Northern District of Florida
Pensacola Division

[fol. 110]

In the United States District Court
for the Northern District of Florida
Marianna Division

Marianna Civil Action No. 799

Filed: May 15, 1970

Robert Mitchum, d/b/a
The Book Mart, Plaintiff,

—vs.—

Clinton E. Foster, et al., Defendants.

ANSWER

COMES NOW the Defendant, M. J. "DOC" DAFFIN, as Sheriff of Bay County, Florida, and for Answer to the Complaint says:

1. As to Paragraph 1, this Defendant admits that the Plaintiff prays for a preliminary injunction but the allegations of the remainder of the Paragraph are denied.

2. The allegations of Paragraph 2 of the Complaint are denied.

3. The allegations of Paragraph 3 are denied. This Defendant says that the Plaintiff's entire operation is generally directed toward the sale of lewd, lucivious merchandise and pornographic material.

4. As to Paragraph 4, it is admitted that CLINTON FOSTER is the prosecuting attorney of Bay County, Florida, and as such is entrusted to the investigation and prosecutorial enforcement of cases brought to his attention or alleging violation of the Penal Laws of Bay County, Florida. The remaining allegation is denied.

5. It is admitted that M. J. "DOC" DAFFIN is the Sheriff of Bay County, Florida, and that CLINTON FOSTER is the prosecuting attorney for Bay County, Florida. The remaining allegations of Paragraph 5 are denied.

6. As to Paragraph 6, this Defendant says that all actions he has taken have been in strict accordance of law and the remaining allegations of Paragraph 6 are denied.

7. The allegations of Paragraph 7 are admitted except as [fol. 111] to the ownership and this Defendant has no knowledge as to the true ownership of same but does not believe that the Plaintiff is the real owner thereof and demands strict proof.

8. It is admitted that the Complaint for temporary injunction was filed as alleged and that a Judgment was entered therein as alleged but it is denied that the Judgment "directing the Sheriff of Bay County, Florida, the Defendant, M. J. "DOC" DAFFIN herein to dispose of same as may be ordered by Judge Fitzpatrick" and it was not so ordered and a copy of the Order is attached to the Complaint and speaks for itself and it is admitted that the Sheriff served a civil subpoena as required by law and the Sheriff alleges that he was not otherwise involved in said proceeding. All of the remaining allegations of Paragraph 8 are denied.

9. It is admitted that Judge Fitzpatrick found a nuisance existed and issued a temporary injunction or restraining

Order, copy of which is attached to the Complaint. The remaining allegations of Paragraph 9 are denied.

10. It is admitted that the Defendant sought a supersedeas from Judge Fitzpatrick which was denied but the remaining allegations of Paragraph 10 are denied.

11. The allegations of Paragraph 11 are denied.

12. The allegations of Paragraph 12 are denied.

13. The allegations of Paragraph 13 are denied and this Defendant says that the Plaintiff has been conducting an unlawful business which has now been restrained by the Circuit Court.

14. The allegations of Paragraph 14 are denied.

15. The allegations of Paragraph 15 are denied.

16. The allegations of Paragraph 16 are denied.

17. The allegations of Paragraph 17 are denied.

18. The allegations of Paragraph 18 are denied.

19. The allegations of Paragraph 19 are denied.

20. The allegations of Paragraph 20 are denied.

21. The allegations of Paragraph 21 are denied.

22. The allegations of Paragraph 22 are denied.

[fol. 112] 23. The allegations of Paragraph 23 are denied.

24. The allegations of Paragraph 24 are denied.

25. The allegations of Paragraph 25 are denied.

26. Now having fully answered the Complaint as ordered by the Court this Defendant says that the Court has no jurisdiction of this cause and that jurisdiction is vested now in the District Court of Appeal in the injunction case pending in Bay County, Florida, and that the Plaintiff has not exhausted his State Remedies.

Respectfully submitted,

Davenport, Johnston & Harris
Attorneys for Defendant
M. J. "DOC" DAFFIN

By Mayo C. Johnston

Certificate of Service (omitted in printing)

[fol. 113]

United States Court of Appeals
Fifth Circuit

May 19, 1970

Mr. Marvin S. Waits, Clerk
Northern District of Florida
P. O. Box 958
Tallahassee, Fla. 32302

PCA 2224 - Mitchum v. Foster

My dear Mr. Waits:

In response to the request of Judge Arnow, I have constituted the Court in accordance with the enclosed designation order which I request you to file.

Copies of this order are being sent to the Judges.

Sincerely yours,

Enclosure

cc:

Hon. Bryan Simpson
Hon. Winston E. Arnow
Hon. Charles R. Scott

In The United States District Court
For The Northern District of Florida

Civil Action No. 2224

Filed: May 22, 1970

Robert Mitchum, d/b/a
The Book Mart

v.

Clinton E. Foster,
Prosecuting Attorney of
Bay County, Florida, and
M.J. "DOC" Daffin, as
Sheriff of Bay County, Florida

(1) Requesting Judge: Honorable
Winston E. Arnow
Northern District of Florida

(2) District Judge: Honorable
Charles R. Scott
Middle District of Florida

(3) Circuit Judge: Honorable
Bryan Simpson

(4) Date of Order: May 19, 1970

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is

properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, [fol. 115] awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate. See *Jackson v. Choate*, 5 Cir., 1968, 404 F.2d 910, *Jackson v. Department of Public Welfare of the State of Florida*, S.D. Fla., 1968, 296 F.Supp. 1341; *City of Gainesville, Georgia v. Southern Railway Company*, N.D. Ga., 1969, 296 F.Supp. 763; *Smith v. Ladner*, S.D. Miss., 1966, 260 F.Supp. 918; *Hargrave v. McKinney*, M.D. Fla., 1969, 302 F.2d 1381; *Langford v. Barlow* [No. 26770], 5 Cir., 1969, 417 F.2d 628, *Langford v. Barlow*, W.D. Tex., 1969, 304 F.Supp. 657;

/s/ JOHN R. BROWN
Chief Judge
Fifth Circuit

[fol. 116]

HARGRAVE v. McKINNEY

Cite as 303 F.Supp. 1381 (1969)

1381

Robert H. HARGRAVE et al., Plaintiffs,**Shellie McKINNEY et al., Defendants.****Civ. A. No. 68-493-CIV-Tampa.****United States District Court****M. D. Florida.****June 27, 1969.**

Action wherein plaintiffs requested certification of case to Chief Judge of circuit to convene three-judge court. The District Court dismissed the case for lack of jurisdiction and the Court of Appeals, 5 Cir., 413 F.2d 320 remanded to District Court with directions to take appropriate steps to convene three-judge court. The District Court, John R. Brown, C. J., held that order constituting three-judge court would be entered.

Order accordingly.

1. Courts ¶101

Doubts about necessity for three-judge court should be resolved in favor of constituting such a court. 28 U.S.C.A. §§ 2281, 2284.

2. Courts ¶101

From an administrative standpoint, it is the better course to constitute a three-judge court on application thereof and allow that court to determine initially question whether to convene such court and other issues, since, assuming a conclusion that it is a one-judge, not a three-judge matter, all of judges may expressly indicate a joinder in that holding and also the holding on the merits by the single judge to whom case is thereby automatically remanded, and, on appeal, Court of Appeals will then have the entire case before it. 28 U.S.C.A. §§ 2281, 2284.

Frank & Grandoff, Tampa, Fla.,
Glassie, Pewett, Bocho & Shanks, Wash-
ington, D. C., for plaintiffs.

V. Carroll Webb, Gen. Counsel, and
Larry Levy, Asst. Gen. Counsel, Office of
Comptroller, Tallahassee, Fla., W. Crosby
Few, Tampa, Fla., for the State.

Robert L. Nabors, Titusville, Fla., for
defendant J. D. Nash.

David U. Tumin, Tallahassee, Fla., for
defendant H. S. Albury.

John W. McWhirter, Jr., Tampa, Fla.,
for defendant K. C. Bullard.

John L. Graham, Jr., Orlando, Fla., for
defendant Earl K. Wood.

William B. Sherman, Deland, Fla., for
defendant Dorothy Matt Mills.

Wayne M. Carlisle, Gainesville, Fla.,
for defendant Shellie McKinney.

J. T. Chancey, Fort Lauderdale, Fla.,
for defendant W. H. Meeks, Sr.

James R. Adams, Naples, Fla., for
defendant A. P. Ayers.

W. J. Ferguson, Lake City, Fla., for de-
fendant Alvin C. Hosford.

F. E. Steinmeyer, III, Tallahassee,
Fla., for defendant Roy Lett.

Thomas J. Shave, Jr., Fernandina
Beach, Fla., for defendant Ira W. Hall.

Harold F. Johnson, Sanford, Fla., for
defendant G. Troy Ray, Jr.

Clyde B. Wells, Defuniak Springs, Fla.,
for defendant Jack Little.

Thomas C. Britton, and Stuart Simon,
Miami, Fla., for defendant R. K. Over-
street.

Jack A. Harnett, Quincy, Fla., for de-
fendant W. A. Summerford.

William J. Rish, Port St. Joe, Fla., for
defendant Harland O. Pridgeon.

Before JOHN R. BROWN, Chief
Judge, United States Court of Appeals
for the Fifth Circuit.

JOHN R. BROWN, Chief Judge:

[1] This case proves again the wis-
dom of resolving in favor of constituting
a 3-Judge Court the initial doubts about
the necessity for such a Court, as out-
lined in Jackson v. Choate, 5 Cir., 1968,

[fol. 117]

1382

302 FEDERAL SUPPLEMENT

404 F.2d 910; *Jackson v. Department of Public Welfare of State of Florida*, S.D. Fla., 1968, 296 F.Supp. 1341, and discussed further in *City of Gainesville v. Southern Railway*, N.D.Ga., 1969, 296 F.Supp. 763. Now—nine months later and after requiring the judicial energies of the Court of Appeals and excluding from a place on the calendar an older case deserving oral argument as a result of expediting this case—it must go back to start all over again as a 3-Judge case.¹

Plaintiffs here formally requested the District Judge before whom this case was pending to certify the case to the Chief Judge of the Circuit to convene a 3-Judge Court pursuant to 28 U.S.C.A. §§ 2281, 2284. The District Judge declined to do so and, acting only as a single Judge, dismissed the case for lack of jurisdiction.²

On appeal the Court of Appeals, by a divided panel, reversed the District Court's dismissal and held that (1) there was no § 1341 jurisdictional bar to the maintenance of the action, and (2) the constitutional question presented was "substantial" within the meaning of *Ex parte Poresky*, 1933, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152. *Hargrave v. McKinney*, 5 Cir., 1969, 413 F.2d 320. Accordingly,

the case was remanded to the District Court with directions to take appropriate steps to convene a 3-Judge Court.

This prologue serves to illustrate once again the usefulness of the procedure of *Jackson v. Choate*, *supra*. Much precious time and energy might have been saved if that procedure had been adopted in the instant case.³

For example, in this case the preliminary questions were first considered and resolved by a single District Judge; then reevaluated and resolved differently by an appellate panel of three Judges. Because of their reversal, the case must now return for consideration of some of the same basic questions by still another panel of three Judges under 28 U.S.C.A. §§ 2281, 2284. Only after their decision will the case be ripe for whatever further appellate consideration might be sought by the parties.

[2] With such a result it is readily apparent that neither time nor judge-power has been conserved by this circuitous process. That the Court of Appeals was divided only augments the practical disadvantages of a decisive initial prediction of the one-Judge or 3-Judge status. In contrast, if the 3-Judge panel had been convened at

1. Case commenced: October 31, 1968
Dismissed: December 13, 1968
Expedited and
calendarred for: March 18, 1969
Court of Appeals
decision
[No. 27140]: June 9, 1969

2. Specifically, the District Court held that the suit was barred by 28 U.S.C.A. § 1341.

3. Not surprisingly, 3-Judge cases continue to be big business in the Fifth Circuit as this table covering my tenure as Chief Judge reflects:

Total Designated 3-Judge Cases

(7/17/67 to 5/30/00)

State	Districts					Total
	Northern	Middle	Southern	Eastern	Western	
Alabama	7	13	4			24
Florida	3	4	10			17
Georgia	21	3	6			30
Louisiana				22	0	22
Mississippi	12		18			30
Texas	13		9	0	8	30

TOTAL DESIGNATED SINCE JULY 17, 1967

102

[fol. 118]

HARGRAVE v. McKINNEY.

Cite as 202 F.Supp. 1301 (1960)

1383

the outset, that panel would have had open to it all the alternatives outlined in *Jackson v. Choate*, *supra*, and substantial amounts of valuable Court and lawyer time might have been saved. And the possibility—even a frequent possibility—of the result being otherwise does not bring about burdens outweighing the advantages. Many times physically assembling the Judges is neither inconvenient nor necessary. And if a decision is initially reached by the 3-Judge Court that it is a one-Judge matter so that the 3-Judge Court is to be dissolved, it is a simple thing to have all three Judges (or a majority of them) join in the ultimate opinion so that little, if any, is left in the event the Court of Appeals subsequently reverses the holding that it is a one-Judge case.⁴

Order constituting a 3-Judge Court is now entered.

4. This sort of ingenuity is reflected in Chief Judge Speers' opinions for himself and Circuit Judge Goldberg and District Judge Roberts in *Rodriguez v. Brown*, W.D.Tex., 1960, 220 F.Supp. 479 (Civ.A. 68-206 SA) and *Rodriguez v. San Antonio Independent School Dist.*, W.D.Tex., 1960, 270 F.Supp. 476 (68-175-SA) of May 12, 1960, and the ultimate opinion expressly joined in by Circuit Judge Goldberg and District Judge Roberts of June 13, 1960, 300 F.Supp. 737. The first opinion stated:

"All members of this panel agree with the quoted conclusions reached by the presiding judge that this is a one-judge, not a three-judge matter; therefore, this cause is remanded to the presiding judge, who will proceed to initially decide the case on its merits. His judgment thereon will become final upon the joinder, by concurrence or dissent, of the other members of the panel. An appeal thereafter will also bring into review the correctness of our order of remand. But, in any event, no matter which way the appellate review goes, whether to the Circuit Court, or ultimately directly to the Supreme Court, the entire case will be before the appellate court for decision. *Jackson v. Choate*, *supra*, 404 F.2d at 913."

In the second case this was adapted to the needs of that case:

"[W]e conclude, without a formal court session, that, in the present pos-

ture of this case, this is a one-judge, not a three-judge matter. As a consequence, this cause is remanded to the presiding judge, who will initially decide the case on its merits; provided, however, that since the parties have requested oral argument on pending motions, and the credibility of witnesses might very well be an issue at the trial on the merits, all members of this panel, in order to keep themselves fully informed, will assemble in one place to convene court formally at such time(s) as shall be necessary to hear all oral arguments to be submitted, and to try this case on its merits. The judgment of the presiding judge will become final upon the joinder, by concurrence or dissent, of the other members of the panel. An appeal thereafter will also bring into review the correctness of our order of remand. But, in any event, no matter which way the appellate review goes, whether to the Circuit Court, or ultimately directly to the Supreme Court, the entire case will be before the appellate court for decision. See *Rodriguez v. Brown*, 220 F.Supp. 479 (W.D.Tex. May 12, 1960)."

The final opinion (68-206-SA) adhered to the earlier decision that it was a one-judge case, but the holding on this and the merits was expressly joined in by all three Judges, 230 F.Supp. 479. Virtually without more it is ripe for decision by the Court of Appeals or the Supreme Court.

[fol. 119] In The United States District Court
For The Northern District of Florida
Pensacola Division

Robert Mitchum, d/b/a, The Book Mart, Plaintiff,

-vs-

Clinton E. Foster, as Prosecuting Attorney of
Bay County, Florida, and M.J. "DOC" Daffin, as
Sheriff of Bay County, Florida, Defendants.

PCA 2224

**MOTION FOR LEAVE TO AMEND THE COMPLAINT
AND TO ADD PARTY DEFENDANT**

Filed: June 4, 1970

TO THE HONORABLE WINSTON E. ARNOW,
UNITED STATES DISTRICT JUDGE:

Complainants, by and through their undersigned attorney, move the Court for leave to amend the complaint filed herein and to add an additional Count II to the amended complaint filed herein, a copy of said Count II is attached hereto, and to add an additional party, The Honorable W. L. Fitzpatrick, in his capacity as Circuit Judge of the Circuit Court of the Fourteenth Judicial District in and for Bay County, Florida, all pursuant to the Federal Rules of Civil Procedure and particularly Rules 15 and 21 upon the following grounds:

1. Jurisdiction so requires and no prejudice will result to any of the parties herein, especially Clinton E. Foster.

2. The aforesaid additional party is necessary and proper as appears from the order entered by W. L. Fitzpatrick, Circuit Judge on April 6, 1970, and his subsequent order to show cause dated May 29, 1970, and received at 10:00 P.M. on June 2, 1970. The aforesaid additional party is subject to the jurisdiction of this Court and can be made a party to the Defendants without depriving this Court of jurisdiction.

3. There has been no answer filed in the original complaint by Clinton E. Foster, Prosecuting Attorney of Bay County, Florida.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by delivery to Clinton E. Foster, Esquire, Prosecuting [fol. 120] attorney of Bay County, Bay County Courthouse, Panama City, Florida; Joe J. Harrell, Esquire, of Harrell, Wiltshire, Bozeman, Clark and Stone, 201 East Government Street, Pensacola, Florida; Honorable W. L. Fitzpatrick, Circuit Judge, Bay County Courthouse, Panama City, Florida; Honorable M. J. "Doc" Daffin, Sheriff of Bay County, Sheriff's Department, Panama City, Florida; this 2nd day of June, 1970; and will be delivered to Raymond L. Marky, Esquire, Attorney General's Office, The Capitol, Tallahassee, Florida, on the 3rd day of June, 1970.

/s/ Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida

[fol. 121]

In the United States District Court for the
Northern District of Florida
Pensacola Division

Robert Mitchum d/b/a The Book Mart,
Plaintiff,

—vs—

Clinton E. Foster, as Prosecuting
Attorney of Bay County, Florida,
M. J. "Doc" Daffin, as Sheriff of
Bay County, Florida, and The
Honorable W. L. Fitzpatrick, as
Circuit Judge of the Fourteenth
Judicial Circuit in and for Bay
County, Florida,
Defendants.

PCA 2224

**AMENDED COMPLAINT FOR TEMPORARY RESTRAINING
ORDER, PRELIMINARY INJUNCTION, AND
PERMANENT INJUNCTION — Filed June 4, 1970**

COUNT II

**TO THE HONORABLE WINSTON E. ARNOW,
UNITED STATES DISTRICT JUDGE:**

The Plaintiff, by his undersigned attorney, complaining of
the Defendant, THE HONORABLE W. L. FITZPATRICK, in

his capacity as Circuit Judge of the Fourteenth Judicial Circuit of the State of Florida, in and for Bay County, Florida, respectfully alleges as follows:

1. The Plaintiff herein realleges the allegations contained in Paragraphs 1 through 5 of the original complaint.

2. The Defendant, THE HONORABLE W. L. FITZPATRICK, is made a Defendant in his capacity as Circuit Judge of the Fourteenth Judicial Circuit of the State of Florida in and for Bay County, Florida.

3. The Plaintiff herein realleges the allegations contained in Paragraph 6 of the original complaint.

4. At all times herein mentioned the Defendant, THE HONORABLE W. L. FITZPATRICK, in his capacity as Circuit Judge of the Fourteenth Judicial Circuit of the State of Florida in and for Bay County, Florida, acting under color and pretense of state law and under the color of statutes, regulations, customs and usage of the State of Florida, and more particularly Florida's obscenity statute 847.011, Florida's nuisance statute 823.05, Florida's [fol. 122] injunction statute 60.05, et seq., in the complained of conduct herein to the injury of the Plaintiff and deprived and seeks to deprive the Plaintiff, his agents, servants, and/or employees of their rights, privileges, and immunities, due process of law, freedom of speech, all protected under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States, and violates and seeks to violate the Plaintiff's civil rights protected under 42 U.S.C.A. 1983 and the laws of the United States.

5. On May 12, 1970, The Honorable Winston E. Arnow entered a temporary restraining order restraining the

Defendants, CLINTON, E. FOSTER, as Prosecuting Attorney of Bay County, Florida, and M. J. "DOC" DAFFIN, as Sheriff of Bay County, Florida, from enforcing the order entered by THE HONORABLE W. L. FITZPATRICK in action number 70-292 B being styled State of Florida vs. Robert E. Mitchum, et al., in the Circuit Court of Florida, Fourteenth Judicial Circuit in and for Bay County, Florida, a copy of said temporary restraining order is already a part of the record as Plaintiff's Exhibit 5 but is again attached as Plaintiff's Exhibit 5. On May 29, 1970, THE HONORABLE W. L. FITZPATRICK in Civil Action Number 70-292 B entered an order, a copy of same is attached hereto as Exhibit 7. The aforesaid order of THE HONORABLE W. L. FITZPATRICK was entered without inquiry or notice to the attorney for the Plaintiff or the Plaintiff herein and is clearly in conflict with and seeks to hold Plaintiff in contempt for operating and maintaining a lawful business as permitted by the order entered by The Honorable Winston E. Arnow hereto attached as Exhibit 8. At 10:00 A.M. on June 2, 1970, the order to show cause entered by THE HONORABLE W. L. FITZPATRICK being Exhibit 7 was received by the Plaintiff.

6. That the said action of THE HONORABLE W. L. FITZPATRICK acting under color and pretense of state law, is an attempt on the same to violate this Court's authority, orders, and jurisdiction, and in effect the aforesaid actions and conduct of THE HONORABLE [fol. 123] W. L. FITZPATRICK deprives the Plaintiff herein, his agents, servants, and employees of their rights, privileges and immunities secured to them by the First, Fourth, Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States and further constitutes a violation of due process of law, deprivation of free speech, protected under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States and violates Plaintiff's civil rights under 42 U.S.C.A. 1983 and is an

attempt to enforce an unconstitutional Florida Statutes 847.011, 823.05, and 60.05, and violates all the rights of Plaintiff as set forth herein especially the right to sell publications not declared to be obscene in a prior judicial adversary hearing held pursuant to due notice. The Plaintiff herein realleges the allegations contained in Paragraphs 7 through 25, of the original complaint which paragraphs when mentioning the Defendants referred to herein as the Defendants Daffin and Foster.

7. The act of THE HONORABLE W. L. FITZPATRICK as set forth herein is an attempt on his part to enforce unconstitutional Florida Statutes, specifically 847.011, 823.05, and 60.05.

8. The aforementioned act of the Defendant, THE HONORABLE W. L. FITZPATRICK, in his capacity as Circuit Judge of the Fourteenth Judicial Circuit in and for Bay County, Florida, is unconstitutional and deprives the Plaintiff herein of his constitutional right to operate and maintain "The Book Mart" business at 19 Harrison Avenue, Panama City, Florida, and the aforesaid Defendant should be restrained and enjoined from the following below recited.

WHEREFORE, Plaintiff herein repeats his prayer in his Wherefore Clause in the original complaint and in addition:

Plaintiff prays as to the Defendant, THE HONORABLE W. L. FITZPATRICK, as follows:

1. That an appropriate order and/or a temporary restraining order be entered setting aside and vacating the order of THE HONORABLE W. L. FITZPATRICK to the same extent already done as shown in Exhibit No. 8 and that that order also apply to THE [fol. 124] HONORABLE W. L. FITZPATRICK; and that the hearing scheduled for Friday,

June 5, 1970, in Civil Action Number 70-292 B be stayed, and that all proceedings therein be stayed, vacated, voided or set aside by this Honorable Court until a determination by the Court of the matters set forth in the original complaint; and that the Court enjoin or restrain by appropriate order THE HONORABLE W. L. FITZPATRICK in his capacity as Circuit Judge of the Fourteenth Judicial Circuit in and for Bay County, Florida, from holding the hearing scheduled for June 5, 1970, or from further enforcing or attempting to enforce any and all previous orders heretofore entered by THE HONORABLE W. L. FITZPATRICK; and that the Sheriff of Bay County and the Sheriffs and Constables of the State of Florida be restrained and enjoined from enforcing said aforesaid order of THE HONORABLE W. L. FITZPATRICK or any other State Judge in that Circuit or in the State of Florida.

2. That THE HONORABLE W. L. FITZPATRICK be restrained and enjoined from further proceeding in Civil Action Number 70-292 B or entering any further orders or proceedings of his own volition in violation of the orders and judgment of this Court in regard to the Plaintiff herein and further that all Defendants, their agents, servants, and employees be restrained from enforcing the April 6, 1970, order or from further proceeding in Civil Action Number 70-292 B as pretains to that order.

3. That a judgment be rendered declaring Section 847.011, Section 823.05, Section 60.05, Florida Statutes to be unconstitutional.

4. That the Court issue a permanent injunction restraining and enjoining the Honorable W. L. Fitzpatrick from the act set forth herein and that the temporary restraining order or appropriate order be made permanent.

5. That a three judge district court be convened to hear and determine this cause pursuant to the authority and requirement of 28 U.S.C.A. 2281 and 2284.

6. That the Plaintiff have such other and further relief as may be appropriate under the circumstances of this case together with costs.

{fol. 125]

Certificate of Service (omitted in printing).

/s/ Paul Shimek,
517 North Baylen Street
Pensacola, Florida

[fol. 126] In the United States District Court for the
Northern District of Florida
Pensacola Division

Robert Mitchum, d/b/a The Book Mart,
Plaintiff

vs.

Clinton E. Foster, as Prosecuting Attorney
of Bay County, Florida, and M. J. "Doc"
Daffin, as Sheriff of Bay County, Florida,
Defendants.

TEMPORARY RESTRAINING ORDER – Filed May 12, 1970

This cause came on to be heard on Plaintiff's application for temporary restraining order. Defendants filed motion to

dismiss complaint which, after hearing, the Court denied.

Plaintiff seeks order restraining the Defendants from interfering with the operation of Plaintiff's business in Panama City, Florida, and from enforcing any orders preventing the conduct of such business without there being first held a prior judicially supervised adversary hearing declaring specific publications obscene before the enjoining of their sale.

On the undisputed facts before the Court, on March 30, 1970, Clinton E. Foster, Prosecuting Attorney for Bay County, Florida, filed in the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, hereinafter called Circuit Court, a complaint wherein he requested that Circuit Court to issue a temporary injunction without bond against the Plaintiff for the conducting or continuing of a nuisance and from removing or in any way interfering with or mutilating the furniture, fixtures, and [fol. 127] and movable property including inventory used in the conduct of the business located at 19 Harrison Avenue, known as The Book Mart, Panama City, Florida. On April 3, 1970, pursuant to three days notice, a hearing was held wherein 25 publications were entered into evidence as exhibits before the Circuit Court. Six of the 25 exhibits presented were declared to be obscene by the Circuit Court. No determination as to the obscenity vel non of the other 19 Constitutionally presumptively protected publications was made. The order reciting the determination of obscenity of six publications was rendered on April 6, 1970, and in addition to the finding of obscenity of the six publications the Circuit Court found that the activities of the Plaintiff at 19 Harrison Avenue, Panama City, Florida, were prima facie, injurious and damaging to the morals and manners of the people of the State of Florida and were prima facie subversive to public order and decency and prima facie constituted a public nuisance. The Circuit Court issued a temporary injunction against Robert Mitchem, his

agents, employees, grantees, assigns and successors from operating and maintaining any business on the premises known as 19 Harrison Avenue, Panama City, Florida, and enjoined Robert Mitchem and his agents, employees, servants, grantees, assigns and successors from removing any property or thing from or off the premises of 19 Harrison Avenue, Panama City, Florida, until further order of that court.

Plaintiff's motion for supersedeas pending determination of interlocutory appeal was denied by the trial court and also by the First District Court of Appeal of Florida.

[fol. 128] Before this Court, it is established by uncontroverted sworn complaint that Plaintiff sells, at this location, other materials besides those held obscene; at least on the record before this Court, that evidence was not presented in any of the state court proceedings held thus far. The state's action is brought and the state court's order entered in the suit seeking, under the Florida Statutes, abatement as a nuisance. Florida Statute 60.05 provides "injunction shall not preclude the operation of any lawful business not conducive to the maintenance of the nuisance". The constitutional right of Plaintiff to sell material unless and until it has been determined obscene in a prior adversary judicial hearing, pursuant to due notice, is now well established. See, among others, *HMH Publishing Co., Inc. v. Oldham*, 306 F. Supp. 495 (M.D. Fla. 1969), and cases therein cited. Under principles enunciated in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and its progeny, the state court order here involved preventing operation of Plaintiff's presumptively lawful business does present irreparable harm and injury, and it appears to be the kind that, in this early stage in the state court proceedings, requires the action taken by this Court in this order. The attacks on the Florida Statutes involved as being unconstitutional are series, and not frivolous.

Accordingly, it is ORDERED:

1. Defendants, their agents, servants, employees and attorneys, and all persons acting under their direction and control, [fol. 129] or in active concert or participation with them, are hereby temporarily restrained from enforcing or seeking to enforce that certain order dated April 6, 1970, entered by the Circuit Court of the Fourteenth Judicial Circuit for the State of Florida, in and for Bay County, in the case styled State of Florida, Plaintiff, v. Robert Mitchem, et al., Defendants, being Case 70-292(B), except to the extent such order prevents the sale, on Plaintiff's premises referred to therein, of any material determined to be obscene in a prior adversary judicial hearing held pursuant to due notice.

2. This order shall become effective upon the filing by Plaintiff of a good and sufficient bond in the penal sum of \$1,000.00 approved by the Clerk of this Court, conditioned that Plaintiff shall pay to Defendants the amount of any damage sustained by Defendants should it later be found this order was wrongfully issued. Unless previously revoked by the undersigned, this order shall remain in force only until the hearing and determination by the full court.

DONE AND ORDERED this 12th day of May, 1970.

/s/ WINSTON E. ARNOW
Chief Judge

[fol. 130]

In the Circuit Court, Fourteenth Judicial Circuit
of The State of Florida, in and for Bay County

State of Florida, Plaintiff,

vs

Robert Mitchum, et al., Defendants.

ORDER—Filed April 6, 1970

This cause came on for hearing upon plaintiff's application for a temporary injunction pursuant to Chapter 60.05 Florida Statutes, and the Court has considered plaintiff's sworn complaint, heard the testimony of plaintiff's witnesses, and has considered the magazines received into evidence and has heard argument of counsel for plaintiff and defendants and finds as follows:

1. This Court has jurisdiction of the subject matter hereof and the parties hereto except the defendant, Clarence Howard Cantey, on whom no return of process has been filed, however, the Court notes that the defendant Cantey was present before the Court and therefore had actual notice of this hearing.

2. That during the time herein material, the defendant, Robert Mitchum, was and is the owner of the business known as "The Book Mart", located and operated at 19 Harrison Avenue, Panama City, Florida, and the defendants, Clarence

Howard Cantey and Dave Ballue, are employees, agents or servants of Robert Mitchum and operate, maintain or carry on The Book Mart business at 19 Harrison Avenue, Panama City, Florida.

3. That on March 19, 1970, the magazines AUTOFELLATIO AND MASTURBATION, DOUBLE UP and SUN YOUTH, Vol. 1, No. 4, were sold by the Book Mart at 19 Harrison Avenue, Panama City, Florida; and that on March 24, 1970, the magazines ROULETTE, [fol. 131] Vol. 3, No. 4, THE SPECIAL, No. 4, and A STUDY OF GROUP SEXUAL PRACTICES, ILLUSTRATED CASE HISTORIES, Vol. 1, No. 1, were sold by The Book Mart at 19 Harrison Avenue, Panama City, Florida.

4. The Court has carefully and thoroughly reviewed the six magazines named above and finds that said magazines prominently and morbidly display the pubic and anal area of the human body. That said magazines show nude males and females in a variety of suggestive positions with morbid attention focused on the genitalia. They show nude males and females in postures and positions which clearly and without doubt suggest that natural, unnatural, perverted or homosexual sex acts have or about to occur. The printed matter in these six magazines, if any, is predominantly devoted to describing matters relating to sex by the constant use of four-letter words of the most vile and vulgar variety, describing sex acts, sex functions, and the genitalia. The sex in these magazines is clear, strong and inescapable.

5. The Court concludes that each of the above named magazines are obscene; that their dominant theme, when taken as a whole appeals to prurient interest, in that their main and only attraction are for those who are perverted, or are morbidly or abnormally curious about sex. The Court further concludes that they have no redeeming social value

and are patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters.

6. On the basis of evidence submitted, this Court concludes preliminarily that the defendants' objective at 19 Harrison Avenue, Panama City, Florida is the selling of obscene, lewd and indecent material for profits (the court notes the apparent exorbitant prices at which these publications are offered for sale), to paying customers who have a perverted, abnormal or morbid sexual curiosity and erotic appetite. That the activities of the defendant at 19 Harrison [fol. 132] Avenue, Panama City, Florida are prima facie, injurious and damaging to the morals and manners to the people of the State of Florida and are prima facie subversive to public order and decency and prima facie constitute a public nuisance. Plaintiff has demonstrated prima facie irreparable harm and damage to the morals and welfare and safety of the people of the State of Florida.

7. That unless enjoined by this Court, the activities and conduct of the defendants at 19 Harrison Avenue, Panama City, Florida will continue and a temporary injunction should issue.

8. This Court is mindful of the important First Amendment rights of the defendants under the United States Constitution and for the protection of those rights, this cause will be given a top priority in this Court's schedule and a final adjudication will be expedited in any manner the defendants may reasonably request.

9. It is upon consideration thereof,

ORDERED:

1. That the defendants, Robert Mitchum, Clarence Howard Cantey and Dave Ballue and their agents, employees,

servants, grantees, assigns and successors be, and they are hereby enjoined from operating and maintaining any business on the premise known as 19 Harrison Avenue, Panama City, Florida and they are further enjoined from removing any property or thing from or off the premise of 19 Harrison Avenue, Panama City, Florida until further order of this Court.

DONE AND ORDERED within the Fourteenth Judicial Circuit of the State of Florida, this 6th day of April, 1970.

/s/W. L. Fitzpatrick
Circuit Judge

[fol. 133]

In the Circuit Court, Fourteenth Judicial Circuit,
of The State of Florida, in and for Bay County
Case No. 70-292

State of Florida, Plaintiff,

vs.

Robert Mitchum, Dave Ballue, Clarence Howard Cantoy, a business known as "The Book Mart, a certain portion of land and building located at 19 Harrison Avenue, Panama City, Florida, and all other persons claiming any right, title or interest in the property affected by this action, Defendants.

ORDER TO SHOW CAUSE

THIS CAUSE being brought on by the Court on its own motion and the Court having been made aware that the

Defendants Robert Mitchum, Clarence Howard Cantey and Dave Ballue, or their agents, employees, or servants, have been and are operating and maintaining "The Book Mart" business at 19 Harrison Avenue, Panama City, Florida, in violation of this Court's order dated April 6, 1970, it is thereupon

ORDERED that Robert Mitchum, Clarence Howard Cantey, and Dave Ballue be and appear before this Court on the 5th day of June, 1970, in Chambers, Bay County Courthouse, Panama City, at the hour of 1:00 o'clock P.M., CDT, to show cause, if any they have, why they should not be adjudged and hold to be in contempt for violating this Court's order dated April 6, 1970.

DONE AND ORDERED in Chambers at Panama City, Bay County, Florida, this the 29th day of May, 1970.

/s/W. L. FITZPATRICK
Circuit Judge

[fol. 134]

In the United States District Court for the
Northern District of Florida
Pensacola Division

Robert Mitchum d/b/a The Book Mart, Plaintiff,

—vs—

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, M. J. "DOC" DAFFIN, as Sheriff of
Bay County, Florida, and THE HONORABLE W. L.
FITZPATRICK, as Circuit Judge of the Fourteenth
Judicial Circuit in and for Bay County, Florida,
Defendants.

NOTICE OF HEARING
FOR TEMPORARY RESTRAINING ORDER
Filed June 4, 1970

TO: Clinton E. Foster, Esquire
Prosecuting Attorney
Bay County Courthouse
Panama City, Florida

Joe J. Harrell, Esquire,
Harrell, Wiltshire, Bozeman, Clark and Stone
201 East Government Street
Pensacola, Florida
Attorney for Clinton E. Foster

M. J. Doc Daffin
Sheriff of Bay County
Bay County Sheriff's Department
Panama City, Florida

Mayo C. Johnston, Esquire
406 Magnolia Avenue
Panama City, Florida
Attorney for M. J. Doc Daffin

The Honorable W. L. Fitzpatrick
Circuit Judge
Bay County Courthouse
Panama City, Florida

Raymond L. Marky, Esquire
Attorney General's Office
The Capitol
Tallahassee, Florida

Please take notice that the Plaintiff, by his undersigned attorney, will call the above styled cause on for hearing for temporary restraining order seeking relief from W. L. Fitzpatrick's May 29, 1970 order to show cause and motion to amend complaint, at 10:30 A.M. on the 5th day of June, 1970, before the Honorable Winston B. Arnow, in his Chambers, at the Federal Courthouse, Pensacola, [fol. 135] Florida.

Please be governed accordingly.

I hereby certify that a true copy of the foregoing was furnished by delivery to Clinton E. Foster, Esquire, Joe J. Harrell, Esquire, M.J. Doc Daffin, Mayo C. Johnston, Esquire, and The Honorable W. L. Fitzpatrick at the above shown

addresses, this 2nd day of June, 1970; to Raymond L. Markey, Esquire, at the address shown above by delivery on the 3rd day of June, 1970.

/s/Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida

[fol. 136]

In the United States District Court for the
Northern District of Florida
Marianna Division
Marianna Civil Action No. 799 or
Pensacola Civil Action No. 2224

Robert Mitchum, d/b/a The Book Malt, Plaintiff,

—vs—

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, and M. J. "DOC" DAFFIN, as
Sheriff of Bay County, Florida, Defendants.

ANSWER—Filed June 5, 1970

COMES NOW the Defendant Clinton E. Foster as
prosecuting attorney of Bay County, Florida, and for answer
to the complaint heretofore filed herein says:

1. He admits that the plaintiff is seeking a preliminary injunction but he denies that the prosecutions in question or threats of prosecution relate to sales and/or seizures of presumptively protected First Amendment printed publications and materials.

2. Admit.

3. He is without knowledge as to whether Robert Mitchum is the owner of the sole proprietorship known as The Book Mart. He admits that said Robert Mitchum was engaged in the sale and offering of books, magazines, newspapers, movie films and pictures but denies the same were presumptively protected under the First Amendment to the Constitution of the United States. He is without knowledge as to the remaining allegations and, therefore, denies the same.

4. Admit.

5. He admits that M. J. "Doc" Daffin, the Sheriff of Bay County, Florida, has exercised the lawful requirements of his office but he denies that he has unlawfully executed the wishes and desires [fol. 137] of Defendant Clinton E. Foster in seizing materials, effecting arrests and in exercising prior restraint by threat of arrest, by arrest, by seizure or by threat of seizure.

6. Admit.

7. Admit.

8. He admits generally the procedure as outlined in the voluminous allegations of paragraph numbered 8 but denies that the only testimony before the court which might

conceivably be a basis for the determination that a nuisance exists was the testimony of Thomas J. McAuley who states that exhibits which the judge examined led him to declare the same to be obscene.

9. He admits that a temporary injunction was issued but denies that the same caused a total and complete suppression and prior restraint of presumptively protected materials. He denies further that the record does not demonstrate that a nuisance exists and denies that the nuisance statute is unconstitutional.

10. Admit insofar as the allegations relate to the denial of a stay. It is denied there was an arbitrary and capricious abuse of discretion and denies there was absolute and total suppression of First Amendment rights by the Circuit Court and by the Appellate Court of Florida. Denies that justice cannot be obtained in the lower level or appellate level of the State of Florida.

11. Deny.

12. Deny.

13. Deny.

14. It is admitted that plaintiff has retained an attorney to defend him against criminal charges but it is denied that said charges are unfounded or based on unconstitutional statutes as written or applied and denies that the results obtained are repugnant to the United States Constitution.

15. Deny.

16. Deny. [fol. 138]

17. Deny.

18. Admit.

19. Deny.

20. It is admitted that plaintiff desires the court to declare the statutes in question to be unconstitutional but defendant denies that plaintiff is entitled to such a declaratory decree.

21. Deny.

22. Denies other than defendant admits that plaintiff desires that the court issue a preliminary injunction.

23. Defendant denies that plaintiff is entitled to a permanent injunction.

24. Deny.

25. Defendant admits that plaintiff is seeking relief as alleged but denies that he is entitled to said relief and denies that the statutes in question are unconstitutional or being unconstitutionally applied. He denies that it is necessary to convene a three-judge court in that the issues raised by plaintiff are so insubstantial as not to warrant the convening of such court.

And for other and further answer and defense the defendant Clinton E. Foster denies that the plaintiff is entitled to any of the relief which he seeks and denies that he is entitled to any damages.

**HARRELL, WILTSHIRE,
BOZEMAN, CLARK and
STONE**
201 East Government Street
Pensacola, Florida
Attorneys for Defendant Clinton
E. Foster

/s/JOE J. HARRELL
Attorney

Certificate of Service (omitted in printing).

[fol. 139]

In the United States District Court for the
Northern District of Florida
Pensacola Division
PCA No. 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

—vs—

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, and M. J. "DOC" DAFFIN, as
Sheriff of Bay County, Florida, Defendants.

**OBJECTION TO JOINDER OF W. F. FITZPATRICK
AS PARTY DEFENDANT—Filed June 5, 1970**

COMES NOW the Defendant Clinton E. Foster as
prosecuting attorney of Bay County, Florida, and files this his

objection and opposition to the motion for leave to amend the complaint to add the Honorable W. L. Fitzpatrick as a party and for grounds for said motion says:

1. That the addition of Judge Fitzpatrick as a party will inject additional issues in this case which are foreign to the main issue.
2. The addition of the Honorable W. L. Fitzpatrick as a party would amount to the trial of an entirely different lawsuit and would unduly complicate the issues to be determined.

HARRELL, WILTSHIRE,
BOZEMAN, CLARK and
STONE
201 East Government Street
Pensacola, Florida
Attorneys for Defendaht, Clinton
E. Foster

Certificate of service (omitted in printing).

/s/JOE J. HARRELL
Attorney

[fol. 140]

In the Circuit Court, Fourteenth Judicial Circuit,
in and for Bay County, Florida

Case No. 70-292

June 5, 1970

State of Florida, Plaintiff,

—VS—

Robert Mitchum, Dave Ballue, Clarence Howard Cantey, a business known as The Book Mart, a certain portion of land and building located at 19 Harrison Avenue, Panama City, Florida, and all other persons claiming any right, title or interest in the property affected by this action, Defendants.

ORDER TO SHOW CAUSE

THIS CAUSE being brought on by the Court on its own motion and the Court having been made aware that the Defendants Robert Mitchum, Clarence Howard Cantey and Dave Ballue, or their agents, employees, or servants, have been and are operating and maintaining "The Book Mart" business at 19 Harrison Avenue, Panama City, Florida, in violation of this Court's order dated April 6, 1970, it is thereupon

ORDERED that Robert Mitchum, Clarence Howard Cantey, and Dave Ballue be and appear before this Court on the 5th day of June, 1970 in Chambers, Bay County Courthouse, Panama City, Florida at the hour of 1:00 o'clock

P.M., CDT, to show cause, if any they have, why they should not be adjudged and held to be in contempt for violating this Court's order dated April 6, 1970.

DONE AND ORDERED in Chambers at Panama City, Bay County, Florida, this the 29th day of May, 1970.

/s/W. L. FITZPATRICK
Circuit Judge

[fol. 141]

In the United States District Court for the
Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

—vs—

Clinton E. Foster, as Prosecuting Attorney
of Bay County, Florida, and M. J. "DOC" DAFFIN,
as Sheriff of Bay County, Florida, Defendants.

TEMPORARY RESTRAINING ORDER—
Filed June 5, 1970

This matter is before the Court on motion for leave to amend complaint and to add as party defendant The

Honorable W. L. Fitzpatrick, in his capacity as Circuit Judge of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, as well as upon the application of plaintiff for a temporary restraining order against the additional defendant. Notice of hearing has been given.

Argument on the motion for leave to amend complaint and to add a party defendant having been heard, the Court has, by oral order entered on the record in the hearing, granted such motion, so that such person, in such capacity, is added as a party defendant.

The Court has heard argument on the question of temporary restraining order. Presented in this case is a substantial attack on the constitutionality of Florida's obscenity statute, section 847.011, and Florida's nuisance statutes, section 823.05 and 60.05. Both statutes are attacked in two respects; first, that the substantive standard by which the alleged material and activity is to be judged, i.e., whether the books are obscene and whether the maintenance of the business is a public nuisance, is so broad as to sweep within its purview not only properly regulated activities but also constitutionally protected activities; and secondly, that the same standard is so vague as to be meaningless to those whose activities are sought to be measured by that standard. In relation to the attack on the application of a Florida nuisance statute to the control of obscenity, the discussion of "common law nuisance" in *Grove Press, Inc. v. City of Philadelphia*, 300 F. Supp. 281 (E.D. Pa. 1969) appears to be pertinent.

On the facts before the Court, it is determined the principles of *Dombrowski v. Pfister*, 380 U.S. 479 (1965) and *Sheridan v. Garrison*, 415 F.2d 699 (5 Cir. 1969), as well as principles enunciated in other and subsequent cases, including, among others, the reference to the question of contempt set

forth in the case of *Kingsley Books, Inc., v. Brown*, 354 U.S. 436, 443 note 2 (1957), show there is here presented irreparable damage requiring the granting of the temporary order hereafter set forth and of such motion of plaintiff, to that extent.

It is, therefore,

ORDERED:

1. The Defendant, Honorable W. L. Fitzpatrick, as Circuit Judge of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, is hereby restrained from holding or proceeding with the contempt hearing scheduled to be held by him on June 5, 1970, as provided in his order dated May 29, 1970, in Civil Action No. 70-292(B), pending before him, and from calling or holding any other contempt hearing based upon or growing out of any alleged violation of his injunction order of April 6, 1970, entered in the suit previously referred to, or any other order that might now or hereafter be entered by him under which plaintiffs are enjoined, restrained or prevented from operating and maintaining "The Book Mart" business at 19 Harrison Avenue, Panama City, Florida, and from enforcing or attempting to enforce any such order, provided, however, defendant is not restrained from proceeding with the scheduled contempt hearing, or any other such hearing, or from enforcing or attempting to enforce any such order entered by him to the extent such hearing or enforcement or attempted enforcement is concerned and deals with the question only of the distribution or sale by such plaintiff at such business of any publications that have at a prior judicial adversary hearing held pursuant to due notice been determined to be obscene.

2. There has been entered a prior temporary restraining order in this case under which a bond has been required to be

filed by plaintiff, and the Court holds that no bond is required in connection with this order.

3. This order shall remain in force only until the hearing and determination by the full court on application for temporary injunction.

The matter will be set on such application for temporary injunction as promptly as reasonably possible by the Court, after receiving application for such hearing.

DONE AND ORDERED this 5th day of June, 1970, as of 11:30 A.M. CDT.

WINSTON E. ARNOW
Chief Judge

[fol. 142]

In The United States District Court For The
Northern District Of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, and M.J. "DOC" Daffin, as Sheriff
of Bay County, Florida; Defendants.

NOTICE OF HEARING
Filed: June 19, 1970

TO: Paul Shimek, Jr., Esquire
Attorney At Law
517 North Baylen Street
Pensacola, Florida
Attorney for Plaintiff

You will please take notice that the Defendant, Clinton E. Foster, as Prosecuting Attorney of Bay County, Florida, will call on for hearing before the Honorable Winston E. Arnow in his Chambers at the United States Post Office at Pensacola, Florida, at 11:00 o'clock, A.M., on Friday, June 26, 1970, a motion to dissolve the temporary restraining order heretofore entered on the 12th day of May, 1970, in the above-styled cause.

**HARRELL, WILTSHIRE,
BOZEMAN, CLARK and
STONE**
201 East Government Street
Pensacola, Florida
Attorney for Defendant, Clinton
E. Foster, as Prosecuting
Attorney of Bay County,
Florida

By /s/
Joe J. Harrell

Certificate of Service (omitted in printing)

[fol. 143]

In The United States District Court for
The Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

-v-

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, and Honorable W.L. Fitzpatrick, in
his capacity of Circuit Judge of the Circuit Court of
the Fourteenth Judicial Circuit, in and for Bay
County, Florida, Defendants.

NOTICE OF HEARING**Filed: June 22, 1970**

**TO: Paul Shimek, Jr., Esquire
Attorney at Law
517 North Baylen Street
Pensacola, Florida
Attorney for Plaintiff**

You will please take notice that the defendants, Clinton E. Foster, as Prosecuting Attorney of Bay County, Florida, and Honorable W.L. Fitzpatrick, in his capacity of Circuit Judge of the Circuit Court of the Fourteenth Judicial Circuit, in and for Bay County, Florida, will call on for hearing before the Honorable Winston E. Arnow in his chambers at the United States Post Office at Pensacola, Florida, at 11:00 a.m., C.S.T., on Friday, June 26, 1970, their motion to dissolve temporary restraining orders heretofore entered on May 12, 1970, and June 5, 1970, in the above-styled cause.

/s/

**Earl Faircloth
Attorney General**

/s/

**Raymond L. Marky
Assistant Attorney General
Co-counsel for Clinton E.
Foster and counsel for Honorable
W.L. Fitzpatrick**

/s/

**Michael J. Minerva
Assistant Attorney General
Counsel for Honorable W.L.
W.L. Fitzpatrick**

The Capitol
Tallahassee, Florida, 32304

[fol. 144] Certificate of Service (omitted in printing)

[fol. 145] In The United States District Court For
The Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

-v-

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, and Honorable W. L. FitzPatrick, in
his capacity of Circuit Judge of the Circuit Court of
the Fourteenth Judicial Circuit, in and for Bay
County, Florida, Defendants.

**MOTION TO VACATE
TEMPORARY RESTRAINING ORDERS**

Filed: June 22, 1970

Come now the defendants, Clinton E. Foster, as
Prosecuting Attorney of Bay County, Florida, and Honorable
W.L. Fitzpatrick, in his capacity of Circuit Judge of the
Circuit Court of the Fourteenth Judicial Circuit, in and for
Bay County, Florida, and moves this Court to vacate the
temporary restraining orders entered herein on May 12, 1970,

and June 5, 1970, on the grounds that the recent decision of the United States Supreme Court in the case of *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, et al.*, _____ U.S. _____ case number 477, October Term 1969, opinion filed June 8, 1970, renders the continuance of said temporary restraining orders inappropriate in this cause.

[fol. 146] WHEREFORE, defendants move the temporary restraining orders be vacated.

/s/ Earl Faircloth
Attorney General

/s/ Raymond L. Marky
Assistant Attorney General
Co-counsel for Clinton E. Foster
and Counsel for Honorable W. L.
Fitzpatrick

/s/ Michael J. Minerva
Assistant Attorney General
Counsel for Honorable
W.L. Fitzpatrick

The Capitol
Tallahassee, Florida 32340

Certificate of Service (omitted in printing)

[fol. 147] In The United States District Court For
The Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

-vs-

Clinton E. Foster, et al., Defendants.

MOTION TO VACATE
Filed: June 24, 1970

COMES NOW the Defendant, M. J. Daffin, as Sheriff of Bay County, Florida, and moves this Court to vacate the temporary restraining orders entered herein on May 12, 1970, and June 5, 1970, on the grounds that the recent decision of the United States Supreme Court in the case of *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, et al.*, U.S. , case number 477, October Term, 1969, opinion filed June 8, 1970, renders the continuance of said temporary restraining orders inappropriate in this cause.

WHEREFORE, Defendant moves the temporary restraining orders to be vacated.

DAVENPORT, JOHNSTON
& HARRIS

ATTORNEYS FOR
DEFENDANT J.J.

DAFFIN, as Sheriff of Bay
County, Florida

/s/ Mayo C. Johnston
406 Magnolia Avenue
Panama City, Florida

Certificate of Service (omitted in printing)

[fol. 148]

In The United States District Court
For the Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

—vs—

Clinton E. Foster, et al., Defendants.

NOTICE OF HEARING

Filed: June 24, 1970

You will please take notice that the Defendant, M.J. DAEFIN, as Sheriff of Bay County, Florida, will call on for hearing before the Honorable Winston E. Arnow in his chambers at the United States Post Office at Pensacola, Florida, at 11:00 A.M., C.S.T., on Friday, June 26, 1970, his motion to dissolve temporary restraining orders heretofore entered on May 12, 1970, and June 5, 1970, in the above-styled cause.

DAVENPORT, JOHNSTON
& HARRIS
ATTORNEYS FOR M.J.
DAFFIN,
as Sheriff of Bay County,
Florida,

/s/ Mayo C. Johnston
406 Magnolia Avenue
Panama City, Florida

Certificate of Service (omitted in printing)

[fol 149]

In The United States District Court For The
Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, M.J. "DOC" Daffin, as Sheriff of Bay
County, Florida, and The Honorable W.L. Fitzpatrick,
as Circuit Judge of the Fourteenth Judicial Circuit in
and for Bay County, Florida, Defendants.

AMENDED NOTICE OF HEARING
Filed: June 26, 1970

TO:

Clinton E. Foster, Esquire
Prosecuting Attorney
Bay County Courthouse
Panama City, Florida

Joe J. Harrell, Esquire
 Harrell, Wiltshire, Bozeman,
 Clark and Stone
 201 East Government Street
 Pensacola, Florida
 Attorney for Clinton E. Foster

M.J. Doc Daffin
 Sheriff of Bay County
 Bay County Sheriff's Department
 Panama City, Florida

Mayo C. Johnston, Esquire
 406 Magnolia Avenue
 Panama City, Florida
 Attorney for M.J. Doc Daffin

The Honorable W.L. Fitzpatrick
 Circuit Judge
 Bay County Courthouse
 Panama City, Florida

Raymond L. Marky, Esquire
 Attorney General's Office
 The Capitol
 Tallahassee, Florida

WHEREAS NOTICE that the Defendant, by their undersigned attorneys, would call on the above-styled cause for hearing on a Motion, before The Honorable Winston E. Arnow in his Chambers at the United States Post Office at Pensacola, Florida, was previously given; and

WHEREAS, Plaintiff's counsel unexpectedly found it necessary to request the parties and counsel to delay several hours; and

WHEREAS, Counsel for Plaintiff represents to the Court that he has checked with each party and their attorney involved, and that they have consented to a three hour delay;

WHEREFORE, this cause previously set for 11:00 o'clock, A.M., on Friday, June 26, 1970, is reset for 2:00 o'clock, P.M., on Friday, June 26, 1970.

I HEREBY CERTIFY that a true copy of the foregoing was delivered personally to the above-named addressees on this 26th of June, after confirmation orally by telephone with each on the 26th day of June, 1970.

/s/ Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida
Attorney for Plaintiff.

[fol. 151]

In The United States District Court For The
Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney of Bay County, Florida, M.J. "DOC" Daffin, as Sheriff of Bay County, Florida, and The Honorable W.L. Fitzpatrick, as Circuit Judge of the Fourteenth Judicial Circuit in and for Bay County, Florida, Defendants.

**MOTION FOR LEAVE TO FILE
SUPPLEMENTAL COMPLAINT**

Filed: July 2, 1970 4:30

PLAINTIFF moves the Court for leave to file a supplemental complaint, a copy of which is attached hereto as

Exhibit A, on the ground that the transactions, occurrences and event stated therein have happened since the date of the Plaintiff's original complaint and that it is in the interest of justice that all issues between plaintiff and defendant be litigated in this action.

Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida
Attorney for Plaintiff

[fol. 152]

In The United States District Court For The
Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney of Bay County, Florida, M.J. "DOC" Daffin, as Sheriff of Bay County, Florida, and The Honorable W.L. Fitzpatrick, as Circuit Judge of the Fourteenth Judicial Circuit in and for Bay County, Florida, Defendants.

**AMENDED COMPLAINT FOR TEMPORARY RESTRAINING
ORDER, PRELIMINARY INJUNCTION, AND
PERMANENT INJUNCTION**

Filed: July 2, 1970 4:30

TO THE HONORABLE WINSTON E. ARNOW, UNITED
STATES DISTRICT JUDGE:

The Plaintiff, by his undersigned attorney, complaining of
the Defendant, THE HONORABLE W.L. FITZPATRICK,

individually and in his capacity as Circuit Judge of the Fourteenth Judicial Circuit of the State of Florida, in and for Bay County, Florida, CLINTON E. FOSTER, as Prosecuting Attorney of Bay County, Florida, and M.J. "DOC" DAFFIN, individually and as Sheriff of Bay County, Florida, respectfully alleges as follows:

1. The Plaintiff has hitherto filed an original complaint, and on June 3, 1970, an amended complaint, and now this supplemental pleading for the purpose of bringing the controversies recited herein up-to-date and introduce newly occurring facts enlarging or changing the relief sought in the original complaint, the transactions or occurrences or events which have happened since the date of the previous pleadings and the relief sought are as follows; On June 19, 1970, numerous documents were subpoenaed after due notice, to be presented before The Honorable W.L. Fitzpatrick, Circuit Judge of the Fourteenth Judicial Circuit, in Chambers at the Bay County Courthouse, Panama City, Florida, on June 19, 1970. On that occasion 228 publications were ordered produced and taken into the bosom of the Court as evidence. Argu-[fol. 153]ments of counsel were heard and an inquiry into a change of ownership of The Book Mart was testified to by witnesses. There was no testimony by any witness as to the contemporary community standards, redeeming social value, or prurient interest, constitutionally necessary to be heard before publications may be declared obscene. A duplicate original transcript of the record is herewith attached as Plaintiff's Exhibit No. 10.

Six days later on June 25, 1970, W.L. Fitzpatrick issued his order declaring eighty (80) of the 228 publications to be obscene. Armed with that finding the Court further found that the operation of the business was prima facie injurious and damaging to the morals and manners of the people of the State of Florida, and was subversive to public order and decency and prima facie constitute a public nuisance which nuisance if permitted to continue would do irreparable harm

and damage to the morals and welfare and safety of the people of the State of Florida. Judge Fitzpatrick ratified and confirmed and continued by his June 25, 1970 Order his previous April 6, 1970 Order which enjoined the Operation of the business. Judge Fitzpatrick then ordered a seizure of all publications offered for sale by your plaintiff on the premises known as 19 Harrison Avenue, Panama City, Florida, ordered their impounding and enjoin and restrained your Plaintiffs from selling or offering for sale any publication named in his order or any other publication of the same or similar character. A copy of Judge Fitzpatrick's June 25, 1970 Order is herewith attached as Plaintiff's exhibit No. 11. This Court on May 12, 1970 and June 5, 1970, in this cause, issued orders enjoining any Defendant from preventing the operating and maintaining of any business on the premises known as 19 Harrison Avenue, except to the extent of any material determined to be obscene in a prior adversary judicial hearing held pursuant to due notice.

John C. Martin, an employee of the Plaintiff, personally observed the Defendant Daffin and his deputies purportedly to act under Judge Fitzpatrick's June 25, 1970 Order, the seizing of each and every publication that was for sale at the location thereby preventing the operating and maintaining of any business at the [fol. 154] location. John C. Martin's sworn affidavit is hereto attached as Plaintiff's Exhibit No. 12.

None of the publications recited in Judge Fitzpatrick's Order were located on the premises except publication recited in his Order as Pinned and recited in the record as Pinned in fact being Pinned No. 1, Cover Girl, which in fact is Cover Girl 13, Cover Girl 16, Cover Girl 19 and Cover Girl 20. These publications are recited in the record as number 220 and 218. In addition the Court had before it Exciting 14 and Exciting 19 shown in the record as number 217 and 223 which were also declared to be not obscene on June 1, 1970 by the United States Supreme Court. The Court also had Gigi shown on the record as number 221 which is also a

publication held not to be obscene by the United States Supreme Court in its Docket No. 1347 entitled Bloss vs. Dykema.

When the seizure was made by the Defendant Daffin no agent had in his possession a list of publications that Judge Fitzpatrick had determined to be obscene. The police arbitrarily striped the store of everything and left the shelves bare. This was a massive seizure by the Sheriff urged and promoted by Judge Fitzpatrick and aided and abetted by Clinton Foster.

WHEREFORE Plaintiff herein repeats his prayer in his previous wherefore clause in the original complaint and in the amended complaint and in addition prays that an appropriate order and/or temporary restraining order be entered setting aside and vacating the order of the Honorable W.L. Fitzpatrick to the same extent already previously done and that the order also apply to all Defendants.

2. That the Defendant Daffin be ordered to forthwith return all materials seized on June 25, 1970 and that the Defendants be henceforth enjoined from seizing publications that are not obscene as a matter of law or from seizing publications that have not been found to be obscene in a prior adversary judicial hearing held pursuant to due notice and specifically named in the order so finding.

3. That the Defendants be enjoined from interfering with [fol. 155] the legitimate business conducted at The Book Mart except to the extent provided for by law after a judicially superintended adversary hearing with notice, an opportunity for discovery, and all the other constitutional and procedural safeguards of the law.

4. That the Defendants W.L. Fitzpatrick, Clinton Foster and M.J. "Doc" Daffin be held in contempt of this Court for violation of its previous orders.

/s/ Paul Shirhek, Jr.
517 North Baylen Street
Pensacola, Florida
Attorney for Plaintiff.

Certificate of Service (omitted in printing)

[fol. 156]

In The Circuit Court, Fourteenth Judicial Circuit,
In and For Bay County, Florida

Case No. _____

State of Florida, Plaintiff,

vs.

Robert Mitchum, et al, Defendants.

This cause came on for hearing before the Honorable W.L. Fitzpatrick, Circuit Judge of the 14th Judicial Circuit of Florida, in Chambers at the Bay County Courthouse, Panama City, Florida, on the 19th day of June, 1970.

APPEARANCES

Hon. Clinton E. Foster,
County Prosecutor,
P.O. Box 4558,
Panama City, Florida

ON BEHALF OF THE
PLAINTIFF

Hon. Paul Shimek, Jr.
Attorney at Law,
Pensacola, Florida

ON BEHALF OF THE
DEFENDANTS.

[fol. 157] Contents of Testimony (omitted in printing)

[fol. 158] **LIST OF PUBLICATIONS**
Composite Exhibit I

1. "HALL OF FAME" Series Number 3.
2. BUTCH TRICKS
3. ROUGH RIDERS
4. BOYS AND MEN IN UNIFORM
5. TRICKS OF THE TRADE, Number 3
6. UNDERGROUND PHOTO ALBUM
7. THE MALE SWINGER, Number 6.
8. THROTTLE
9. NUDE CRUISE, Number one
10. ONE PLUS ONE
11. NAKED YOUTH, -Volume One, Number One
12. YOUNG NAKED CHAMPS
13. JACK AND HIS BOX

14. PHALLIC DEVELOPMENT IN THE MATURE ADULT
15. BEAUTIFUL BOYS, Volume One, Number One
16. NEW FACES OF '69, Number 2
17. ROGUE'S TARGET
18. YOUTH IN ART, Number 1
19. NEW FACES OF '69
20. TEENY BOY BOPPERS
21. GOLDENBOYS SCORE
22. PRIVATE STOCK
- [fol. 159] 23. BOYS TOGETHER
24. "CALL BOY"
25. SISTERS, Issue Number 1
26. ROGUE'S BIG D ANNUAL
27. LEATHER MEN, Number 2
28. PHALLIC DEVELOPMENT IN THE PRE-ADOLESCENT
29. BLACKMALE
30. BIG BOYS
31. DONNY
32. SPARTAN FOR MEN, Volume One, Number One

33. PHALLIC DEVELOPMENTS, ITS VARIATIONS AND EXTREMES

34. THE RAWHIDE MALE, Number One

35. HUSTLER

36. AN "INTIMATE" & GAY DIARY, Volume One, Number One

37. THE MALE FIGURE REVIEW, Number One

38. CHAMPIONS ALL, Number 2

39. BOB ANTHONY'S YOUNG CHAMP

40. GAETANO, Number One

41. STAR PRESENTS BOB ANTHONY'S BEEFCAKE, Number 5

42. DOUBLE EXPOSURE, Number 1

43. J. BRIAN PRESENTS BOB ANTHONY'S BEEFCAKE, Number 2

44. YOUNG CHAMPS

45. TRIGGER, Number 3

46. BOB ANTHONY'S YOUNG CHAMP, VOLUME 1, Number 2

47. 5 IN A BARN

[fol. 160] 48. ROUGHNECK, Number 1

49. ACTION

50. H R M SCENE '69, Number 1
51. GAY CONFESSIONS, Number 1
52. NEKKIDS, Volume One, Number One
53. NUMBER ONE, YOUNG LORDS
54. REX, Number 1
55. THE MALE SEXUAL ORGANS, Book 1
56. CHICKEN, Volume One, Number One
57. NAKED BOYHOOD, Volume One, Book One
58. THE THREE LITTLE BARES
59. PARLAY
60. DUET
61. GOING STEADY, Number 1
62. ODD LOVE, Number 1
63. TOUCH, Issue Number 1
64. TWIN PAK
65. PAIRED
66. KISSING PARTNER, Number One
67. LINDA AND LAURIE
68. WORLD OF WOMEN

69. ABOUT FACE

70. ZULU

71. YOUNG MODERNS, Volume 1, Number 1

72. SMART SET

[fol. 161] 73. CANDY BOXES

74. SWEETIE

75. CAPRICE

76. SUGAR PIE, Volume 1, Number 1

77. CANDY

78. DARIA, Volume 1, Number 1

79. BROADWAY GIRLS

80. ITALIA

81. SCORE

82. PEAK, Number 1

83. FRENCH PASTRIE

84. CALLIOPE

85. DAWN, Volume 1, Number 1

86. PUFF, Number 3

87. DEARS & REARS, Number 4

88. MING, Number One
89. MODERN WOMEN, Volume 1
90. CURIOUS TWO
91. NIRVANA SPECIAL, Number 10
92. DEARS & REARS, Number 2
93. PIG LLE
94. HELENA
95. HUG-KISS
96. CORINTH
97. MODERN WOMAN, Volume 1, Number 2
- [fol. 162] 98. JEZEBEL
99. TARTARUS
100. MIMI
101. BIT OF BEAUTY
102. KITTY, Collectors Issue Number 1
103. UPON, Collectors Issue Number 1
104. LADY FINGER, Issue Number 1
105. CLEOPATRA
106. HONEY, Number 1.

- 107. RENÉ, Number One
- 108. WELCOME ABROAD, Number 1
- 109. SUGAR COLLECTORS, Issue Number One
- 110. GALARAMA, Number two
- 111. FRENCH PASTRY, Number One
- 112. THE NAME IS "BONNIE"
- 113. SWEETIE, Collectors Issue Number One
- 114. '69 NUDIES, Collectors Issue Number 2
- 115. TANGERINE, Number 1
- 116. SPECIAL NUMBER CHARISMA
- 117. MOMMAS
- 118. MERRY WIDOWS, Number One
- 119. HI-SOCIETY GIRL, Volume 1, Number 1
- 120. SARFARI
- 121. ANGEL, Volume 1, Number 4
- 122. CUDDLES, Number 1, Collectors Issue
- [fol. 163] 123. CHERRY
- 124. JADE, Volume 1, Number 1
- 125. MISSIE, Number 1

- 126. HAR LOW
- 127. SUZETTE, Number 1
- 128. PRINCESS
- 129. SIREN
- 130. JAGUAR, Issue Number One
- 131. TIGER, Issue Number One
- 132. LOLLIPOP
- 133. LIVE
- 134. BOTTOMS UP
- 135. CUTIE
- 136. SISSIE
- 137. MAKE OUT, Volume 1, Number
- 138. YOUNG LOVE
- 139. DUETTE, Number 1
- 140. OUR WORLD, Volume 1, Number 1
- 141. CHEATERS, Volume 1, Number 2
- 142. YOUNG STUFF, Number 2
- 143. FRENCH FRILLS, Volume 9, Number 2
- 144. EROSCREEN, Volume 1, Number 3

- 145. SPECIAL EDITION, 30 Pages of Full Color
- 146. WIVES ALONE, Volume One, Number One
- 147. TORRID, Volume 3, Number 4
- [fol. 164] 148. GALLERY, Number 2
- 149. HIGH HEELS, Number Fifteen
- 150. BIZARRE FILMS, Number One
- 151. FOXIE, Number 2
- 152. BLACK SILK, Number One
- 153. FANTASY
- 154. TWO PLUS TWO, Volume 2, Number 2
- 155. FUN AND GAMES, Volume 2, Number 2
- 156. ONE PLUS ONE, Volume 2, Number 2
- 157. FLESH & FANTASY, Volume 3, Number 2
- 158. O-R-G-Y, Volume 2, Number 2
- 159. NUDE REBELS, Volume 2, Number 1
- 160. CASE HISTORIES, A STUDY OF LESBIAN PRACTICES, Volume 1
- 161. SEXUAL FREEDOM
- 162. EXSTASY, Volume 2, Number 1
- 163. TWO PLUS TWO, Volume 2, Number 1

- 164. LEZO, Volume 4, Number 1
- 165. GAY STUDS, Volume 2, Number 1
- 166. SAVAGE SEX, Volume 2; Number 2
- 167. NYLON PARTY, Volume 6, Number 4
- 168. SWITCH, Volume 1, Number 1
- 169. ROSA, 2
- 170. HIT FUN, Volume 1, Number 1
- 171. SUZIE'S SIX, Volume 1, Number 1
- 172. SIN & SIGH
- [fol. 165] 173. IN SCENE, Number Four
- 174. THREE, Number 3
- 175. CINEROTIC, Volume Two, Number One
- 176. CINEMATES, Volume One, Number One
- 177. SEX EXPOSE
- 178. THE TOUCHABLES, Volume 1, Number 2
- 179. SWINGERS EYE, Number 1
- 180. WARM UP
- 181. THE SPECIAL, Number 5
- 182. NAKED SWAPPERS, Volume 1, Number 1

183. SWINGERS SCENE, Volume 1, Number 4
184. PLAY TIME
185. RAPE
186. SEX SECRETS
187. 2 In 1
188. INTIMATE COMPANIONS, Volume One, Number 2
189. INTIMATE AFFAIRS, Volume 1, Number 1
190. PARTY PAIR, Number 1
191. SWINGERS CONFESSIONS, Volume 1
192. UNLIE, Volume 1, Number 1
193. EROTICA, Volume One, Number One
194. BLAST OFF, Number One
195. CHERE-1
196. TORRID, Volume 3, Number 6
197. MALE LOVERS
- [fol. 166] 198. GAY STUDS, Volume 2, Number 1
199. GAY STUDS, Volume 1, Number 2
200. BLACK & BEAUTIFUL, 14
201. JOSIE

202. THE NEWLYWEDS, Number One
203. C'EST LA VIE, Volume 1, Number 1
204. EROTIC, Volume 1, Number 5
205. THE SPECIAL, Number 5
206. THE TOUCHABLES, Number One
207. UNMASKED NOW! THE NAKED REVIEW
208. LUSTY TALES, Volume 1, Number 1
209. JOHN
210. HAND TO MOUTH
211. BLACK ORGIES
212. CAMPUS NYMPHOS
213. BUSY BOX
214. LIGHTS, CAMERA, ACTION
215. TO THE PROPAGATION OF THE SPECIES
216. UNDERGROUND PHOTO ALBUM
217. EXCITING
218. COVER GIRL (4 magazines, different people on cover)
219. PRESENTING TOY
220. PINNED

221. GIGI

222. FABULOUS, Number 2

[fol. 167] 223. EXCITING

224. WINK

225. FABULOUS FANNIES

226. INGENUE

227. THE BALLERS, Number 1

228. MY-O-MY

[fol. 168]

(Thereupon, Court was convened at approximately 9:00 A.M.)

(Mr. Shimek) First of all, just for the record let me pose my objection of being required to produce by subpoena all of the documents, some 200 or so—they will be produced—however I request that I not be required to turn them over except by Your Honor's direction. Because I do not voluntarily do so. I do so under protest, but I acknowledge the Court's position and I certainly would turn them over upon your order.

Secondly, I think it is a deprivation of due process of the Fifth Amendment, Fifth Amendment Process also to be required to turn this over.

And lastly I request a jury trial and I requested one last time, it was not granted and I understand and I know that

847.011 being an action in equity does not generally require a jury. Nevertheless, demand for jury trial is made and I leave that also to Your Honor.

Finally, my only lengthy argument here, probably about 10 minutes, I can make right now and this will be my objection to the Constitutionality of the statutes. My position basically in about three sentences is: That under *Stanley versus Georgia*, copies of which I will furnish the Court for which is cited as 89 Supreme Court 1243 decided by the U.S. Supreme Court in April of 1969, is the position of the defendant, that since the [fol. 169] Supreme Court says that you have an absolute right to possess obscene materials, no matter how bad it is, the corollary is that you have a right to receive it and if you have a right to receive it then it may be procured from some person who may supply it, namely a supplier who has a corresponding right to sell it, or to send it. If someone has a right to possess it he has a right to procure it, namely to receive it or to buy it. Corresponding right is in a seller to sell it or to send it.

If that right exists, which I submit that it does under *Stanley*, and I will argue just as quickly, then furnishing of obscene materials an absolute right, cannot be made a crime, and the property cannot be confiscated for any reason.

(The Court) For the purposes of this argument you are admitting that these are obscene materials?

(Mr. Shimek) O no, I am saying—

(The Court) Just for the purpose of argument.

(Mr. Shimek) Oh, just for the purpose of argument, yes.

Now, I have *Stanley versus Georgia* before me and I will take a few minutes to go through it.

Roth versus United States, 354 U.S. to 467 is a basic case on which the state of Florida generally relies saying obscenity is not protected by the First Amendment. There was a time when we agreed with Roth. Our question was what was obscenity. Our argument was it was hard core pornography, [fol. 170] namely any publication which depicts sexual activity. This is what we argued in that brief. Subsequently we think that the law has changed so rapidly to the point now that I think probably Monday or the following Monday the U.S. Supreme Court will in accordance with the Stanley decision announce that the sale and distribution of obscene materials cannot be made constitutionally a crime and cannot be prohibited unless one of three situations exist, namely: Exposure to children, imposing upon an unwilling public, pandering, and invasion of privacy.

Anyway Roth held that obscenity was outside the protection of the First Amendment and that the government could regulate its possession and its distribution at will, like any other contraband. But Stanley indicated Roth didn't go that far. Roth—and I am reading now from Stanley okay—"Roth and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither Roth or any other decision of this Court reaches that far."

Then in the Stanley Court, the Court goes on to examine the constitutional implications and the governmental interest that is involved. And this was the Georgia Statute which prohibited just mere private possession of obscene material. [fol. 171] They went on to say that "The door barring Federal and State intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. Roth and the cases following it discerned such an important interest in the regulation of commercial distribution of obscene material."

But to say that the state of Florida has an important interest in the commercial distribution is not to immunize all Statutes touching commercial distribution from further judicial scrutiny.

In Stanley the state of Georgia sought to justify its own statute on the ground that it was a necessary incident to statutory scheme prohibiting distribution. This did not prevent the Supreme Court from weighing the governmental interest against the protection of the Constitution.

Now what I am getting to here really is, the state of Florida under these circumstances has no valid governmental interest and therefore it cannot pursue in this manner. And I start with the proposition that the state of Florida may not legislate to control what books and what films a person may possess in his house regardless of their contents. Now we are starting with that proposition which Stanley is very clear on. If the government—and I am reading again out of Stanley, which says, “If the First Amendment means anything it means that [fol. 172] a state has no business telling a man sitting alone in his own house what book he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”

Now this is the United States Supreme Court speaking.

“If the government has no substantial interest in preventing a citizen from reading a book or publication or anything or from watching a film in the privacy of his own home, then clearly it can have no greater interest in preventing or prohibiting him from acquiring them. The only possible purpose in preventing him from acquiring them is to prevent him from enjoying them.”

Going back to Stanley: “It is now well established that the Constitution protects the right to receive information and

ideas. This freedom of speech and press necessarily protects the right to receive. The right to receive information and ideas regardless of its social worth." Verbatim from Stanley.

Now, the government's interest in the state of Florida is not augmented because a person buys the material instead of receiving it in some other way. He doesn't have to go to Denmark to get it, and I have a case here which says that.

So it is my contention that a person has a constitutional right to buy or to receive obscene material, based on Stanley, and the argument that I have just proposed. So then I ask can it be reasonably argued that although the state of Florida may [fol. 173] not directly prevent someone from buying a book, can it achieve the same result indirectly by making it a crime to sell the book, or by some injunctive process to seize the material assuming it to be obscene. I don't think so. Unless the state of Florida can demonstrate it has some substantial interest, some reason, in preventing the sale other than keeping the purchaser from buying it.

Now there are four goals that the state of Florida and other states and governments have used to justify restrictions on dissemination of obscene materials, four things: (1) Preventing crimes of sexual violence, (2) Protecting the society's moral fabric, (3) Protecting children from exposure to obscenity, (4) Preventing an assault on the sensibilities of an unwilling public. Those four items.

Well, it is clear to me from the Stanley case that the Supreme Court did not consider either preventing crimes of sexual violence or protecting society's moral fabric as a legitimate justification for obscenity legislation. And they said that when they said as follows: "In the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the state of Georgia has

a right to control the moral content of a person's thoughts. To some this may be a noble purpose but it is wholly [fol. 174] inconsistent with the philosophy of the First Amendment. The Constitution's guarantee is not confined to the expression of ideas that are conventional or shared by a majority. And in the realm of ideas it protects expression which is eloquent no less than that which is unconventional. Nor is it relevant that obscenity in general or the particular films there are before the Supreme Court are arguably devoid of any ideological context. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn." It went on to say that: "Whatever the power of the state to control public dissemination of ideas inimical to public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

And they go on to say, "Perhaps recognizing this Georgia asserts that exposure to obscenity may lead to devious sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion." And they give a whole bunch of citations, articles, psychological discussions in great depth. "But more important, if the state is only concerned about literature inducing antisocial conduct we believe that in the context of private consumption of ideas and information we should adhere to the view that among free men the deterrence ordinarily to be applied to prevent crime are two things: Education and punishment for violations of [fol. 174] the law." And I submit that means that if a crime of sexual violence is caused, punish the crime of sexual violence. Or through the medium of education. This is what the Supreme Court has said. Anyway, given the present state of knowledge, the state may no more prohibit mere possession of obscenity on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

Now the Supreme Court has recognized the protection of children, and valid interest, and it has recognized protection of an unwilling public from obtrusive invasions of privacy as a proper governmental interest which justifies obscenity law. But neither of them can be used in our opinion to justify prohibiting selling to a requesting, in fact a demanding adult who has to pay an exorbitant price. There is no public display in this case. There never has been. There are no children involved in this case and there never has been, no pandering, no imposing upon an unwilling public. No invasion of privacy. So, no valid governmental interest remains, and I suggest that the conclusion is absolutely inescapable that the government, the state of Florida, cannot constitutionally suppress or bring about a criminal prosecution on the basis of obscenity.

The Court cited the Griswold case. Griswold versus Connecticut. I know you are familiar with this but I will quickly capulize it. In Griswold the Court reversed the [fol. 176] convictions of some people who had given information, instructions, and medical advice to married people as to the means of preventing conception. The Court reasoned that the Constitution guaranteed married couples the right to be free to choose whether or not they could employ contraception. This includes the right to receive information and devices from a birth control clinic. The right to practice birth control would be meaningless if the state were to prevent people from receiving information, ideas, and devices. Well, in Stanley the Court recognized the right of a person to choose what he was going to read and what he was going to observe. The distributor may similarly be allowed to provide what the person is entitled to see.

I am just about through. My last comment would be, Judge: that we are all aware—I am aware of the ground swell of support in Bay County particularly and in Florida in general for laws that crack down on what they call smut peddlers. Numerous laws, in this area are now being reconsidered by the Congress. Your decision today, which I

suggest should be that the government has no valid interest in suppressing this material, even if it is obscene, unless it falls within one of those three categories: Invasion of privacy, pandering, or the exposition to children. Unless that is shown the government, the state of Florida, has no right to pursue these publications for purposes of suppression or destruction or for [fol. 177] the purposes of prosecuting in criminal cases. If that decision today is given you are certainly not going to comfort those who are concerned about the problem but it is going to bring it dramatically into focus. Logically by use of the Supreme Court's wording themselves, the real problem that has come down from the Supreme Court, 23 in a row I know of citing the Redrup decision simply finding not obscene again and again and again, in that it has not filtered down to the lower court and it is a very difficult concept to accept. And that is why we want—(inaudible words)—the Supreme Court for arbitrarily, otherwise, saying again and again, not obscene, not obscene. The latest one, the Dykema (phonetic) Case which I brought and I will leave a copy with the Court.

~~Your decision like that on that ground would interfere only with those laws which seek to tell an adult, an adult only, what literature or what films he can acquire for his own enjoyment and that is all.~~

Now we may not always agree with the literary taste of our fellow citizens not only of Bay County but of the state of Florida, but we may not impose our case or your case upon others by censorship or by other means unless some greater interest of society is at stake. That is the price that you have got to pay for a free society. I have attempted to show that there is no other governmental interest here other than thought control to sustain the attempted suppression of materials, even if you [fol. 178] find them to be obscene.

That is our position, Your Honor. I will leave copies of Stanley with you. As a matter of fact, last month a district

court in California found percisely as I have indicated to you justly, government cannot pursue this matter of suppression or criminal prosecution unless it has a valid governmental interest. It has a valid governmental interest in only three categories: Children, invasion of privacy, and pandering on an unwilling public. If you don't find that, it is now our position and we think that Monday a decisio will be coming down from the Supreme Court on this or the following Monday, that if you don't have this situation it is an unconstitutional statute. You can't tell adults what to buy, and they have a right to buy it.

Thank you.

(The Court) Have you checked with your client on this list to see whether or not they are—

(Mr. Shimek) May I check with him outside?

(The Court) Yes.

/(Thereupon, a short interruption occurred as counsel stepped outside.)

(Mr. Shimek) In order to save time I have thumbed through the booklets that we have with an employee of the corporation [fol. 179] selling the material and I will stipulate that the entire evidence in the three boxes that we have here may go into evidence as representative of what is being sold at the store, that I object to having to produce it but I understand it is your order that I now produce it and I do produce it, and so I have no objection to the whole mess going into evidence except I will object to producing it in the first instance anyway.

(The Court) Your objection to the production is well preserved in the record. Would you agree that it be marked as evidence as indicated on the subpoena duces tecum?

(Mr. Shimek) Yes, this is fine. As the whole box.

(The Court) As the publications appear here by name and number in the subpoena? That would be the easiest way to keep up with it I assume.

(Mr. Shimek) All right.

(The Court) Those that may not be produced—

(Mr. Shimek) Then we may even have some duplicates in here, a couple of a copy or we may have a couple that don't belong. But at any rate at the last minute they just grabbed, a few others too, to represent everything in the store and that is all we can say.

(The Court) Of course I can't do anything until I review that evidence.

(Mr. Shimek) I recognize that.

[fol. 180] (The Court) And it looks like quite a job.

(Mr. Shimek) I stipulate this can all go if this is what the court orders me.

(The Court) All right, I will take it then and review it. Is there any testimony that either side wishes to offer?

(Mr. Foster) Yes sir, I would like to briefly examine—

(The Court) In that stipulation, Mr. Shimek, you admit these publications and those of like nature are being offered for sale?

(Mr. Shimek) Yes sir. I stipulate this is representative of what is being sold at the Panama City Book Store, yes.

(Mr. Foster) It is implicit in your stipulation, Paul, that magazines of other kinds and natures other than those that you have produced as representative are offered for sale?

(Mr. Shimek) Oh, we have some newspapers that I don't think are on here. What I have here are mostly magazine type. This is what the basis—all these are magazine types, I believe. We don't have newspapers, don't have written books.

(Mr. Foster) What you are saying in essence is this is representative of the type of material whether it is newspaper or magazine or paper back that is being offered for sale.

(Mr. Shimek) Oh no, these are representative of magazines. Now there are also newspapers, there were also written books, but all these I understand are magazines, aren't they? Yeah, there may be some of those in there.

[fol. 181] (Mr. Foster) I want to call Mr. Cantey as an adverse witness for just a few questions.

(The Court) You all may not be communicating. I understood Paul's stipulation to be that the publications presented to the Court under protest are representative of all of the publications offered for sale at the book store.

(Mr. Shimek) Of all the magazine type publications. Apparently he has some others that are not on the list.

(The Court) Who do you call as a witness?

(Mr. Foster) Mr. Cartey.

CLARENCE HOWARD CANTEY

DIRECT EXAMINATION

By Mr. Foster:

Q. You are Clarence Howard Cantey? A. Yes, I am.

Q. And what is your present occupation, Mr. Cantey? A. Employed by the Walton Street News, Atlanta, Georgia.

Q. And where are you working? A. 76 Walton Street, Atlanta, Georgia.

Q. Are you at this time an employee of Robert Mitchum? A. Well, he is one of my bosses. But he is not the owner of the store, but he is one of my bosses.

[fol. 183] Q. He is an officer of the corporation that you are working for? A. Yes sir.

Q. And when did you cease working for Mr. Mitchum in his capacity—in the capacity as an individual? A. That I really don't know because I didn't know that he had gone out of ownership of the book store here in Panama City and when it was incorporated into a store of its own. I mean, as a corporation. They didn't tell me this. This is all of a sudden. (Inaudible words)—else and the selling used the same rubber stamp for payment purposes. Same kind of pay check I get from Walton Street.

Q. When was the last time you worked at the Panama City Book Mart?

(Mr. Shimek) Let me impose one objections just for the record. Your Honor, I object to this line of questioning. I thought the purpose of this Hearing was to determine whether or not certain books were obscene. We acknowledge that he is an employee. Now we are getting into the corporate structure or other—

(The Court) Question of whether we've got the right defendant in—

(Mr. Foster) Mr. Shimek made a statement in his admission that this was representative of the material that the

corporation was selling. If you wanted to say that's representative [fol. 183] of material that Mr. Mitchum is selling I might can dispense with some of these.

(Mr. Shimek) I see. I don't believe, and I don't know either, but I do not believe that Mr. Mitchum runs this store. I might state to the Court that in the beginning when Mr. Mitchum came down I filed a fictitious name under the Fictitious Name Statute for him announcing that Mitchum is doing business as the Panama City Book Mart. Subsequently attorneys out of Atlanta who handle the business affairs of other corporations in this field tell me that he is incorporated. And the name of the corporation, the Florida corporation is, I believe, "Panama City Book Mart, Incorporated, a Florida Corporation." That is the extent of my knowledge. I believe also the incorporated in the spring. They opened here in February. I know it was not at least until March that there was not an incorporation and it may be April. It was April, probably was, I don't know. I don't know that the employees would know anything more than that. But that is the extent of my knowledge.

(The Court) You might ask whether or not Mr. Cantey has any additional knowledge along that line.

Q. (Mr. Foster continuing) Do you have any personal knowledge, Mr. Cantey, as to who the owner of the Panama City Book Mart is today? A. No sir, I don't.

[fol. 184] (Mr. Shimek) Let me suggest you could write to Tallahassee and I think you could find out.

(Mr. Foster) Mr. Shimek, do you recall the last suit that was filed in United States District Court, Northern District of Florida, Pensacola Division, is dated the 29th day of April?

(Mr. Shimek) Yes, I remember that. I think there is an affidavit signed by—

(Mr. Foster) That a sworn complaint?

(Mr. Shimek) Right.

(Mr. Foster) And you recall in that complaint the allegation that Mr. Mitchum owned and operated the Panama City Book Mart as sole proprietorship.

(Mr. Shimek) Right, that was an affidavit filed under oath. As far as I knew at that time that was correct.

Q. (Mr. Foster continuing) On the last time you were paid by the Panama City Book Mart, do you recall in what manner you were paid, Mr. Cantey? A. Yes, sir, it was a check as always with a rubber stamp of the signature of Robert Mitchum.

Q. And there was no other legend or— A. You talking about the check?

Q. Yes. A. It just said, "Bay National Bank of Panama City, Florida." and it also had at the top, "Panama City Book Mart," and [fol. 185] that was all that was on the check itself.

Q. Then it was signed by Robert— A. Robert Mitchum.

Q. What date did you receive your last check? A. I really—let's see. The last check I received. I received it in Atlanta. Because there was a delay in the mail or something. Anyway it was the first part of this week is when I received it. It was either Monday or Tuesday, I am not sure of the day.

Q. Okay. Mr. Cantey, you have worked for the Book Mart or Mr. Mitchum since sometime in the middle of February, have you not? A. To my knowledge I went to work for Mr. Mitchum, on February 24, because as I remember we

Q. And certain types of newspapers? A. Yes sir, some types of newspapers.

Q. And certain types of papers back books such as this one? A. Yes.

Q. And I believe also you have some machines with films down there for viewing? A. Yes sir.

[fol. 188] Q. And do you have any other type of material that was offered for sale? A. Now at which time are you talking about?

Q. At any time. A. At any time. To begin with I did have some. This was all the extent of it to begin with. Later I received some films and at other times I received novelty items.

Q. What type of novelty items? A. I don't even know what you call them, to tell you the truth.

Q. Can you describe them if you can't call them. A. They are just gag purposes, like a—

(Mr. Shimek) Your Honor, I would object to this line of questioning. If he has some evidence of whatever he wants to present to the Court, certainly he could question him on it, but he's questioning him as to what he has at his store. He no longer works there and he has numerous material. If he wants to subpoena some more I am sure the Court will order it to be done, but to talk in the vacuum about something that isn't here, unless he is going to produce it and can represent such I think it is immaterial, Your Honor.

(The Court) The objection is overruled.

(The Witness) Well, the way to answer it, if I say one thing and you say it's another, because a novelty item can appear to be two different things to two different people.

Q. (Mr. Foster Continuing) You tell me what you think it is. [fol. 189] A. All right. These are simulated rubber goods for adult purposes of items that have been talked about.

Q. Simulated male sex organs? A. Yes sir, that's one of them.

Q. Simulated female sex organs? A. No sir.

Q. What other type of rubber goods do you have other than simulated male sex organs? A. Copies of what was—what I call, "The French Tickler."

Q. Okay. And what else? A. To my knowledge that is the extent of it.

Q. At any time during your operation of the Book Mart did you offer for sale Time magazine? A. No sir.

Q. Life magazine? A. No sir.

Q. Better News Publications? A. No sir.

Q. Did you ever offer for sale Playboy magazine? A. No sir, but I did offer to sell the calendar.

Q. Did you offer for sale any daily newspapers of any place in this area, any town in this area? A. No sir.

Q. Do you offer for sale or viewing any type of material that does not relate or pertain to sex or sexual activity, [fol. 190] Mr. Cantey? A. Yes sir, I most certainly do.

Q. What? A. Education.

Q. Sex education? A. Evidently.

Q. Well, do you offer for sale or did you offer for sale anything that related to education of anything other than sex? A. Of education of anything other than sex. No sir, don't believe I do. If it's there I am not aware of it.

Q. So everything that was located on the store premises and offered for sale or offered for distribution in some manner related to sex. A. Yes sir.

Q. Mr. Cantey, were you employed at the Book Mart on March 24, 1970? A. Yes sir, Panama City Book Mart, yes sir.

Q. Do you know a lady named Evelyn Cox? A. Yes sir. Well, I know her as Mrs. Cox, wife of a doctor, but I don't know her first name.

Q. Did you ever make a sale of any material to her? A. Yes sir, I did.

Q. Do you recognize this as being one of the articles purchased by her? A. I couldn't say for sure but she purchased several items. [fol. 191] She told me she wanted to purchase several things she wanted to use as evidence and she wrote a check for it and they were books, and mostly books, and I think a couple magazines.

Q. Do you recognize this as being an article sold by you or stocked in your store? A. Yes sir, this is sold in the store. But as to whether she bought it for sure or not, I am not certain but I would say off hand it most likely is one she purchased.

Q. What about this one. Would you read the name of that.

(Mr. Shimek) Your Honor, may I interpose an objection. It is apparent that he has no personal knowledge or

recollection as to Mrs. Cox specifically buying this publication and I suggest that the best evidence is Mrs. Cox. This is—

(The Court) Well, if he can identify them I will permit it. If he can't, of course he will have to produce the purchaser.

(The Witness) "Busy Box."

Q. (Mr. Foster continuing) Do you recognize that as being—

(The Court) He has testified that this is one of the items that is sold in the store, which would make it admissible.

Q. Okay, sir, What about this one, Mr. Cantey? A. Yes, sir, this is sold in the store also.

Q. Would you read the name on that, please. A. Well, I would like to but I can't pronounce it. "Campus [fol. 192] Nymphos" or something.

Q. "Campus Nymphos?" A. Yes sir, I believe that's correct.

Q. Do you recognize this as being a publication that is sold in your store? A. Yes sir, it is.

Q. Would you read that, please. A. "Black Orgies."

Q. Do you recognize this as being an article sold in your store? A. Yes sir.

Q. Would you read the name on it. A. "Hand to Mouth."

Q. And what about that one? A. Yes, this is sold in the store, "John." The name, "John."

Q. On a good bit of the material that you all sell, Mr. Cantey, do you have it wrapped in a cellophane cover, transparent cellophane cover? A. Yes sir.

Q. And of course you have to handle this, individually handle the item individually to wrap it. A. If I wrap it, yes sir.

Q. When you were working down there did you wrap most of them? A. No sir.

Q. Who wrapped them? [fol. 193] A. I hired an individual to wrap most of them for me because I was very busy with other things. A friend of mine that was fired at the Downtown Theatre. He was projectionist. And I just paid him out of my own pocket, not as an employee of the store but out of my own pocket to work on the side for me.

Q. Do you know what the mark up was on these publications?

(The Court) That is immaterial, counsel.

(Mr. Foster) I have no further questions, Your Honor.

(The Court) Mr. Cantey, what volume of business do you do at that store?

(The Witness) Sir?

(The Court) What volume of business do you do at that store or did you do?

(The Witness) It varied very much.

(The Court) Roughly, how many publications would you average selling a day, or items?

(The Witness) Items? I would say anywhere from 6 to 20 items, sometimes possibly more. But that is average.

(The Court) Mr. Shimek?

(Mr. Shimek) Let me ask just a couple questions.

[fol. 194] CROSS EXAMINATION

By Mr. Shimek:

Q. Do you have any personal knowledge that any particular person purchased these five publications that are here, namely "Busy Box," "Campus Nymphs," "Black Orgies," "Hand to Mouth," and "John." A. Do I what?

Q. Do you have any particular personal knowledge of any particular person in particular purchased any or all of these? A. I couldn't say that they actually did, no.

Q. You don't know who might have purchased them. A. Not absolutely sure, no. I didn't make a list of Mrs. Cox's books.

Q. One other question that he asked you. Was the name on the check "Panama City Book Mart, Incorporated" or just "Panama City Book Mart", or do you recall? A. That she wrote out the check?

Q. No. That you got paid. A. Oh, my pay check.

Q. Yes. A. It just said, "Panama City Book Mart."

Q. As far as you can recall? A. Yes sir.

(Mr. Shimek) All right. I have no further questions.

(Mr. Foster) Mr. Cantey, you did testify though—

[fol. 195] (The Court) You don't have to repeat it.

(Mr. Foster) I would like to offer these in evidence.

(The Court) Any objection?

(Mr. Shimek) I can't object. I don't know what grounds I would have.

(The Court) I will mark these in consecutive numbers to those listed on the subpoena, starting with 215 and in order.

Do you have any other questions?

(Mr. Foster) Nothing from Mr. Cantey. I have a very few of Mr. Ballew.

[fol. 196]

CLAUD DAVID BALLEW

DIRECT EXAMINATION

By Mr. Foster:

Q. Mr. Ballew, would you state your name, please. A. Claud David Ballew.

Q. And how do you spell that last name? A. B-a-l-l-e-w.

Q. And what is your permanent address? A. My permanent address?

Q. Yes. A. Atlanta address.

Q. What is that? A. 365 Connally Street.

Q. Who are you employed by? A. I am employed by Panama Book Mart, Incorporated.

Q. And when were you employed by Panama City Book Mart, Incorporated? A. I really don't know the date, sir, because—

Q. Has it been recently? A. I really couldn't say, I haven't paid that much attention to it. Because I am a salaried employee and I don't have that much working knowledge of the corporation.

Q. Has it been this month? A. No sir, I don't know.

[fol. 197] Q. Was it last month? A. I really couldn't say, sir.

Q. Are you still taking your orders from Mr. Mitchum? A. Mr. Mitchum is my immediate supervisor, yes.

Q. And did you gather together the items that were produced this morning pursuant to subpoena? A. Part of them, yes.

Q. And who assisted you? A. Tony Martin.

(Mr. Shimek) Mr. Tony Martin is an employee there and assembled most of this. Mr. Ballew came in from out of town and may have assisted, but the present employee is Tony Martin who has been there for some short period of time.

Q. (Mr. Foster continuing) Mr. Ballew, do you know whether or not there is presently on the premises of the store other copies of the material that was produced here this morning? A. I do not have that knowledge, no sir.

Q. How long have you worked for Mr. Mitchum? A. How long have I worked for Mr. Mitchum?

Q. Yes sir. A. Somewhere in the neighborhood of a year.

Q. Are you rather familiar with his practices insofar as operations are concerned? A. You mean in operating the store?

Q. Yes. [fol. 198] A. I would say as far as the retail end of operating it I would probably be familiar with that.

Q. Do you know whether or not it is his practice when a subpoena is received such as received in this case to remove from the display racks all the items mentioned in the subpoena and have another shipment of magazines of different titles sent in? A. Whether or not unless they were declared illegal to sell, then they would be removed.

Q. If declared obscene they are removed and another shipment of material is sent in? A. I would presume. I would presume that if he were going to stay open he would remove the stuff that was illegal for sale and replace it with something legal.

(Mr. Shimek) I would like to object to the line of questioning because it calls for a conclusion of the witness. He simply can't say. He says "I presume". He can only tell and give conclusions. And so I would move that the answer be stricken as well as the question.

(Mr. Foster) All I ask him was did he know and all he had to do was tell me whether or not he knows.

(The Court) Do you know, sir?

(The Witness) I couldn't say for sure. In retail stores. He asked me if I had any knowledge of operations in retail stores. I would assume this is what he would do.

[fol. 199] (The Court) Well, do you know?

(The Witness) I couldn't say for sure.

(The Court) All right.

Q. (Mr. Foster continuing) How much time have you actually spent in the Panama City Book Mart? A. I really

couldn't say definitely. I would say somewhere in the neighborhood of maybe a month.

Q. Do you have knowledge of any type of material or goods that were offered for sale at this establishment that does not in some manner relate to sex? A. That are or have been offered?

Q. Yes sir. A. Well, it would depend on how you would call it related to sex. If a female torso you are saying relates to sex, then I would have to say I don't have that kind of knowledge of it.

Q. Well, do you offer anything for sale that doesn't relate in your words to sex in the sense of education or literature or what have you?

(Mr. Shimek) Your Honor, I object to that question. The material is here, it can be examined. There will be testimony on it whether or not it relates to sex. This is a fishing expedition, Your Honor, asking about every little thing there is and I just think it's immaterial.

(The Court) I think the point is already covered.

[fol. 200] (Mr. Foster) I have no further questions.

(Mr. Shimek) I have none.

(The Court) Let me ask you what the movies that I have heard about generally depict.

(The Witness) Sir?

(The Court) What do the movies that are offered for sale at the Panama City Book Mart generally depict?

were going to open Monday following George Washington's birthday but I found out we had to have some license for movie machines and so I delayed a day to purchase the license for the movie machine.

Q. How was the material that was offered for sale shipped into the Book Mart, Mr. Cantey? A. How were they shipped in to us?

Q. Yes. A. Now they came through Bay Transportation Company.

Q. How were they invoiced? A. From Peachtree News Incorporated.

Q. Were they shipped to your store on consignment or your [fol. 186] store actually purchased those magazines and were actually owners of them? A. Well, it says billed to Panama City Book Mart.

Q. Did you pay for the invoices? A. No I paid for the shipment of the materials only but not the—

Q. You mean the freight? A. Well, let's see. No, I believe the freight even had been paid also.

Q. Did you write anybody a check or give anybody any money for the books that you received? A. To the best of my knowledge I did not pay Bay Transportation Company for receiving any books or magazines, that they were prepaid. But I did pay Bay Transportation Company money for—I mean for other things that came in.

Q. Okay sir. Mr. Cantey, in the establishment that you managed and operated for Mr. Mitchum at 19 Harrison Avenue, you offered for sale in there certain types of magazines or periodicals, is that right?

(Mr. Shimek) May I interrupt, Your Honor. I didn't realize—we slid so nicely into this hearing that I never thought about invoking the rule. I would like to invoke the rule.

(The Court) Is there anybody else that you intend to call?

(Mr. Shimek) These are the only two employees.

(Mr. Foster) I don't think anyone else is in here that I intend [fol. 187], to call.

(The Court) Do you want one of your employees out?

(Mr. Shimek) I would like for one to stay with me if I may, keep Mr. Ballew at this point.

(The Court) All right. I see no real reason to exclude either one unless objected to.

(Mr. Foster) I don't—

(Mr. Shimek) Okay, but I am asking that the rule be invoked.

(Mr. Foster) There is no one in here at present that I will call.

(Mr. Shimek) I see. This is the general public then. Excuse me, I didn't know that.

Q. (Mr. Foster continuing) You offer for sale certain types of periodicals or magazines? A. I offer them for sale.

Q. Yes. A. I have them displayed for sale, yes sir. Same thing I guess.

(The Witness) Burlesque type dancers and this type of thing. They are as a rule from what I have seen of them and I haven't seen all of them because I just work there, and they are burlesque type movies.

(The Court) Any questions?

(Mr. Shimek) I have no further questions.

(Mr. Foster) No further questions.

(The Court) All right. Any further evidence?

(Mr. Foster) No sir.

(Mr. Shimek) Your Honor, may I let the record reflect that I am handing you a copy of the U.S. Supreme Court decision of Stanley versus Georgia with certain lines underlined in green, which I related to in my discussion.

(The Court) All right. Do you gentlemen want to wait until the Court reviews the evidence?

(Mr. Shimek) No, I imagine that the Court will read my brief, at least the section on what the Supreme Court has said is obscene, and I imagine it will take the Court some time [fol. 201] to review the evidence, all of which is in. I might tell the Court that it is not necessary, if you want to save the time, as burdened as you are, to number each one, if they are just counted and account for that number later it is all right with me.

(The Court) All right. If you agree I don't intend to write on each publication because they are identified in the subpoena and these that were admitted in addition to those that were subpoenaed I put in consecutive numbers on my copy of the subpoena. If you want to put them on yourself I will give you the numbers which have been assigned to them for the file.

(Mr. Foster) Okay.

(The Court) 215 is "John". 216 is "Hand to Mouth". 217 is "Black Orgies". 218 is "Campus Nymphs". 219, "Busy Box".

(Mr. Shimek) Your Honor, I am advised the correct numbers here, there are 4,5,6 that are not here by title but others represented are here to get the exact number.

(The Court) If there is substantial compliance with the subpoena, counsel, there will be no further action. If there is not you will be contacted.

(Mr. Shimek) All right.

(The Court) Mr. Bailiff, can you get some help to cart that stuff to my car.

(The Bailiff) Yes sir.

[fol. 202] (Mr. Shimek) Your Honor, there is a decision that I mentioned earlier, Dykema versus Bloth, which was handed down by the Supreme Court two weeks ago. Citation is 169 Northwest Second 367, and I will give you a copy.

(Mr. Foster) I would like to point out to the Court that was reversed by a four to three decision and I don't think that it can be considered as pressing for anything other than the facts and circumstances of that particular case.

(Mr. Shimek) I am simply telling the Court the Supreme Court has reversed this decision by the Michigan Supreme Court saying the materials are not obscene. It goes into great detail describing what is obscenity and the Supreme Court felt they knew, but the U.S. Supreme Court said clearly by a four to three decision that the materials that they found obscene are not obscene. This is all I am handing you the decision for it has to be read.

(The Court) Both sides announce that you rest?

(Mr. Foster) Yes.

(Mr. Shimek) Yes. Will you give me a ruling on the introduction of evidence and the motion for trial?

(The Court) Yes. * * * * *

[fol. 203]

Certificate of Service (omitted in printing)

[fol. 204]

In The Circuit Court, Fourteenth Judicial Circuit,
In and For Bay County, Florida
Case No. 70-292 (B)

State of Florida, Plaintiff,

—vs—

Robert Mitchum, et al., Defendant.

ORDER

Filed June 25, 1970, 10:53 A.M.

This cause coming on for further temporary hearing, pursuant to due notice, and the parties and their counsel having appeared, and the Court having heard the evidence of the witnesses, argument of counsel, and having reviewed the publications offered in evidence, finds as follows:

1. That the testimony of the witnesses and statements of counsel for the Defendants show that the publications

introduced into evidence are a fair representation of all publications offered for sale at the place of business known as "The Book Mart" located at 19 Harrison Avenue, Panama City, Florida. Counsel for the Defendants candidly announced to the Court that it is the position of the Defendants that "Having the right to purchase and possess obscene materials the Defendants have the right to sell the same".

2. That it is unrealistic to say that these publications if sold to the public would not find their way into the hands of children; a great many of said publications actually use children as models.

3. That the publications introduced into evidence show, and in vile and vulgar language, describe various sexual criminal acts, some of which are: Contributing to the delinquency of minors—sodomy—lewd and lascivious behavior—fornication—indecent exposure of sexual organs—abominable and detestable crime against nature— and buggery; that said publications[fol. 205] constitute assaults upon the moral views of the community involved.

4. That many of said publications using minors for models identify the models by name, age, and state of residence and imply that there is a "Hall of Fame" to which certain minors are elected because of unusually large sex organs.

5. Among other publications the Court has carefully reviewed the following: HUSTLER, BIG BOY, GAY CONFESSIONS, CHICKEN LITTLE, Number 2, CHICKEN LITTLE, Number 1, TRICKS, ODD LOVE, SMART SET, PINNED, PAIRED, GOING STEADY, WORLD OF WOMEN, YOUNG LOVE, COVER GIRL, YOUNG STUFF Number 2, SWINGERS SCENE, THE BALLERS, SPECIAL NUMBER 5, THROTTLE, SWINGERS, FRUIT, RUT RIDERS, MEN AND BOYS IN UNIFORM, ONE PLUS ONE, NAKED YOUTH, BEAUTIFUL BOYS, TARGET, YOUTH IN ART, PRESENTING IRON, TEENY BOY BOPPERS, SCORE,

PRIVATE STOCK, BOYS TOGETHER, CALL BOY, BIG D., LEATHER MEN Number 2, PHALLIC-DEVELOPMENT IN ADOLESCENTS, DONNY, HALL OF FAME, GAY DIARY, YOUNG CHAMP, DOUBLE EXPOSURE, YOUNG CHAPS, TRIGGER, FIVE IN A BARN, ROUGH NECK, NEKKIDS, YOUNG LORDS, REX, CHECKEN, LINDA AND LAURIE, NAKED BOYHOOD, SEXUAL FREEDOM, C'EST LA VIE, SWITCH, ECSTASY, CASE HISTORIES, LESBIAN PRACTICES, NUDE REBELS, ORGY, FRENCH FANTASIES, AUTO FELLATIO AND MASTURBATION, DOUBLE UP, SUN YOUTH, ROULETTE, THE SPECIAL, A STUDY OF GROUP SEXUAL PRACTICES, FUN AND GAMES, BLACK SILK, WIVES ALONE, EROSCREEN, FRENCH FRILLS, CHEATERS, MAKE OUT, BUSY BOX, JOHN, BLACK ORGIES, CAMPUS NYMPHOS, HAND TO MOUTH. All of the foregoing have been determined by the Court to be hard core pornography and obscene, lewd and indecent material; that their dominant theme appeals to the prurient interests in that their main purpose is to attract the attention of those who are perverted or are morbidly or abnormally curious about sex; that they have no redeeming social value and are patently offensive because they affront contemporary community [fol. 206] standards relating to the description or representation of sexual matters. Counsel for Defendants has stipulated that all of the above have been and are being offered for sale to the general public, minors excluded, and that they fairly represent all publications sold at the business known as "The Book Mart", 19 Harrison Avenue, Panama City, Florida, operated by the Defendants. The Court finds that the operation of such business is prima facie injurious and damaging to the morals and manners of the people of the State of Florida and are subversive to public order and decency and prima facie constitute a public nuisance and if permitted to continue will do irreparable harm and damage to the morals and welfare and safety of the people of the State of Florida.

The Court has heretofore on April 6, 1970, enjoined the operation of the business described herein and said injunction

is hereby ratified and confirmed and continued as the order of this Court.

In consideration of the foregoing, it is

ORDERED AND ADJUDGED that the Sheriff of Bay County, Florida, do forthwith seize all publications offered for sale by the Defendants herein on the premise known as 19 Harrison Avenue, Panama City, Florida, impound the same and retain possession thereof pending a final hearing herein and the Defendants and each of them are hereby enjoined and restrained from selling or offering for sale any publication named herein or any other publication of the same or similar character.

DONE AND ORDERED in Chambers on this the 25th day of June, 1970.

/s/ W.L. Fitzpatrick
CIRCUIT JUDGE

[fol. 207]

In The United States District Court For The
Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney, of Bay
County, Florida, M.J. "DOC" Daffin, as Sheriff of
Bay County, Florida, and The Honorable W.L.
Fitzpatrick as Circuit Judge of the Fourteenth
Judicial Circuit in and for Bay County, Florida,
Defendants.

AFFIDAVIT

STATE OF FLORIDA)

COUNTY OF ESCAMBIA)

BEFORE ME, the undersigned authority, personally
appeared JOHN C. MARTIN, who, being by me first duly
sworn, deposes and says:

At or about 1:30 P.M., Thursday, June 25, 1970, a
gentleman, who introduced himself as Deputy Barfield of the
Bay County Sheriff's Office, came into The Panama City
Book Mart, of which I am the manager, accompanied by two
uniformed Deputy Sheriffs, one of whom was a lady, and
read to me a copy of a court order issued in the Circuit
Court, Fourteenth Judicial Circuit, In and For Bay County,
Florida, Case No. 70-292 (B), State of Florida, Plaintiff, vs.

Robert Mitchum, et al. Defendant, on the 25th day of June, 1970, and signed by W.L. Fitzpatrick, Circuit Judge.

Deputy Barfield then explained to me that this order required him to seize all the publications which I had on sale, but that it did not include anything which was not on sale, such as publications stored in the back room of the store.

Deputy Barfield further explained that he was not sure about certain items in the showcase, but that he would have to get a decision on them, these items included novelties, playing cards, [fol. 208] and pack of photographs.

I told Deputy Barfield, that as he had a court order to do these things, that I would not interfere with his carrying out the order of the court.

Deputy Barfield then instructed the two uniformed deputies who were with him to start removing the books from the racks on the wall and that they were to list every title, including where appropriate, the volume and/or issue number, and also the quantity of each title on the list, as they were removed from the wall.

Deputy Barfield told me that he would give me a copy of this list. Same is attached hereto.

Deputy Barfield also made arrangements by telephone for additional help and soon other people arrived to help him. During the course of the afternoon a large number of people came into the store and left as members of Deputy Barfield's party worked.

Deputy Barfield told me that I could let customers continue to come into the store and look, but that I could not sell anything as everything was already seized, he explained that the Court order did not close the store, just seized everything that I had for sale, and that I could do as I

pleased about letting customers into the store so long as they couldn't buy anything. As a means of avoiding confusion and because I could not sell the store's merchandise I turned all potential customers away.

One of the members of Deputy Barfield's party brought in a small number of boxes, which Deputy Barfield said they had gotten at a grocery. As these boxes did not look strong enough to protect the books from damage, I went into the back room of the store and brought out boxes in which books had been shipped to the store and offered them to Deputy Barfield for use in packing the books. Deputy Barfield accepted the offer and none of his boxes were used.

As the boxes were filled Deputy Barfield had them sealed with masking tape and then he signed each box on the top of the tape and afterwards he asked me to initial the tops of the boxes also.

After consulting with various persons who came into the store and finally with Sheriff Daffin, Deputy Barfield told me that [fol. 209] he would have to seize the playing cards and photo sets and movie films. These as well as all the other seized publications were not subpoenaed for the hearing on June 19, 1970, however, novelty items would not be included in this seizure. I heard Sheriff Daffin tell him that he was to take anything with a photograph showing nudity as it was pornography.

One box of books which I had by the counter, which was sealed up and which contained books which I had prepared for return to the distributor, was questioned and when I explained what it was and that the contents of the box was not on sale, same was not taken and I was instructed to put it in the back room.

I was given a copy of the Court Order at 3:30 P.M., by Deputy Barfield. I was not harassed in any way during the

entire operation, except that Sheriff Daffin told me that for sanitary reasons he would cut my long hair and shave my beard if he should ever have occasion to confine me in his jail.

After the last box was removed, I was given a receipt for 66 boxes of books at about 6:30 P.M. Deputy Barfield told me that he would give me a xerox copy of the list of books taken if I would come by the jail and see him in the Sheriff's office on Friday morning, June 26th, 1970.

On Friday morning, June 26th, 1970, I went to Deputy Barfield's office and picked up the copy of the list.

When I saw the order I realized that some of the publications listed had been declared not to be obscene in Bloss vs. Dykema, a recent United States Supreme Court case. Nevertheless they seized Exciting 14 and Exciting 19, Pinned No. 1, Missie No. 1, Cover Girl 13, Cover Girl 16, Cover Girl 19, Cover Girl 20 and Gigi which are not obscene as a matter of law. Judge Fitzpatrick [fol. 210] found Pinned No. 1 obscene nevertheless and some publications like Rut Riders which don't exist.

/s/

John C. Martin

SWORN AND SUBSCRIBED TO before me the undersigned; a Notary Public in and for the County and State as aforesaid, on the 1st day of July, 1970.

/s/

Notary Public

Golden Bays	1871	
Romana #1		
Youth in Art #4	1871	
Youth in Art #3	1871	
Male Pys #5	11	
Cog & Co (the Golden Cocks)	Vol 1 #1	1871
The Bay Breeze	Vol 1 #1	11
Bay Breeze	Vol 2 #1	1
Ches. Vol 2 - same		1871
Young Champ.	Vol 1 #6	1
Mrs. Sun	Vol 1 #12	11
Admiral		1871 1871
My Bay	Vol 1 #1	1871 1871
Naked King Lake		1871
Young Mavische #1		1871 1871
Unicorn		1871
Tudis Bay		1871 1871
Male Lovers	Vol 2 #2	1871 1871
Romans II		1871 1871
Male Figure Review #2		1871 1871
David #1 Duels		1871
Miss Bay #1		1871
Miss Bay	Vol 1 #1	1871
Shim		1871 11
Young Lion	Vol 1 #1	1871
W. Kean	#1	1871
Bala	#1	11
Hummi	Vol 1 #1	1871
Sun & a Breeze		1871 11
Tigger	Vol 1 #2	1871
Youth in Art #2		11
Torn of Portland Album 2		11
The Edinburgh 2		11

Gay Confessions Vol 1 #2	1
Highest Studio Review #1	1
Highest Youth #9	11
Lynne Annual #2	11
Husky #3	11
Tom Cat #1	111
Unicorn #1	11
Brown #1	11
Thing up	111
Chain Male #1	11
Puckee	11
Male Male #3	1
Bay + Burne	111
American Bay Vol 1 No 1	111
All Stars (winter issue)	1
The Bay next Door #1	2
Bayology	11
Golden Bay 20	111 11
Bay Male Swinger No 2	1111
Golden Bay 13	111
" " #9	1
Swingade No 2	11
Water No 1	111
Three square) The Silent Men	1
Big Burne	111
The Island	111
Tom Bay #1	111
The Silent Men No 2	11
Stud No 2	11
Three square) The Silent Men #	11
Swing men at Home & Play	11
Unleash 2 Album	11
Book 4/700 Printing (Columbia)	11

Golden Page	13	"	"
" "	14	"	"
The Teane Series	No. 1	"	"
Wagner's Gallery	No. 1	III	"
Spot No. 1		"	"
The Teane Series	No. 2	"	"
The American Sunbaker Magazine	No. 8	"	"
Photographic Club of Mass. Index	No. 3	"	"
Hillman Sun	No. 3	"	"
Trade Voyager	No. 1	"	"
Trade Page #3		III	"
The Photographic Manual "The Sex Change"		Vol. Complete	"
Sex. Romance		III	"
Sex. Confidential		III	"
Sunbeam	Vol. 1 #5	"	"
Tricky	#5	III	"
Shaded Glass	#6	III	"
Golden Lark		I	"
Barometer Student	#6	III	"
Cuddle	#6	III	"
Empty	#6	III	"
Don't the Sun Bunch	#3	III	"
Frank Belle	#6	III	"
Field House	Vol. 1 #1	III	"
Tempo	Vol. 1 #1	"	"
Wood Trade	#2	III	"
Don't Mind	#11	III	"
The Day	Vol. 1 #1	III	"
Trade Contact	#2	III	"
Three Faces of Liza		III	"
Sun Bunch	#5	III	"

100 Coleraine Calmar		III
Naked Swapper	vol 1 #2	III
On Nudist		III
This is Nudity		III
Mondette Duet		III
Nude Contact	#1	III
Tripper	vol 1, #5	III
(Promiscuous Hummer)		III
Trisby	#6	III
Nude Days	#5	III
Nudevue	#5	III
(Pretence)	#1	III
Moony Birds	#10	III
See Guest	#10	II
Light N Shadow	#5	I
Love World		III
Nudist Photography		III
Nude One	#4	III
Lesson	#3	III
Nude Form	#1	III
Nude Day	#4	II
" Exploration	#12	I
New Direction	#16	I
Four Seasons	vol 1 #8	II
Nude Image 22		I
Nudity	#32	II
Joint Venture	#3	III
The History of Rape Past & Present		II
Scinseopi		III
All new '69 Nudes	#1	I
Nudist Youth	#13	II
70 Teen Beauty		I
Nudeism Today		I
Nude Era	Vol 1, #4	III

Indian Needle		III
Indian Leaf	vol 1	III
Indian Lane	#5	III 1
Indian Youth	#5	II
Indian West	#13	II
Indian Youth	#14	I
Playing Cards	#1	II
Violet	#1	II III
Hurricane	#1	II
Courtesan	vol 1	III
New Expecting		I
Flower Children	vol 1 #1	III 1
Sweden		II
Night owls	#1	III
Crest	vol 1, #1	II
Windy	#1	III 1
Bobcats		III
Wild Life	vol 1 #1	I
The Dove	vol 1 #1	III
Kesset	vol 1 #1	II
Curious One		III
Curious Four		III
Curious Three		III
Red Sign		II
Tease	vol 1 #1	III
Teenage Jaybird	#2	II
Beetle	vol 1 #1	II
Gale		I
Race	#1	II
Expecting		III III
Looney Doony		III III
Sandrina		II
Davidson		II

Little	vol 20	III
Little	#1	III
Monkey-Tongue Book	#1	III
Mule Lane	#2	III
Pittie		III
Regency magazine		III
Cross Brochures		III
Sandy	no 1	III
Highwell	vol 4 no 1	III
Robert Gault	Master of Tomorrow #15	III
Young Love	#1	III
Under		III
Sailly	#7	III
Skiena	#1	II
Missie	#1	III
Beach	#1	III
Hot	#1	II
Carbure	#1	II
Respard	Issue #1	III
Indigo	#1	I
Explosion		III
Skylark	#1	II
Reggie		III
75 Teen Beauty Calendar		I
Over 21	Issue #1	III
White Rebels	#4	III
Mule of the Revolution	#15	I
Open (to you)		III
Empress	vol 1	III
Cream & Sugar	#1	III
Cave	#2	III
Brown	#2	III
Contact	vol 1 #1	III
Don't Service	#1	III

Best. 2 '69	val 1. #1	///
New Lawrence	val 1. #10	///
Candid radiatarius	val 1. #2	///
Mudifay		///
Scandia		///
Cougar	#1	///
Fanny	val 1. #4	///
Chenger	val 1. #1	///
69 Lines with Sandi	val 1. #1	///
Two Plus Two		///
Unnie		///
Toni		///
Daddy's Noddy	#12	///
Fever	val 1. #1	///
Miss Sisco	val 1. #2	///
Bluff	val 1. #1	///
Jacobi 2		///
Circ	#1	///
Splice		///
My Girl	val 1. #1	///
Stormy	#7	///
Sissy	#1	///
Wonder Girl		///
Madamie		///
Phyllis	val 1. #1	///
Panther		///
2 - Jesse	val 1. #1	///
Sick & Sooty		///
Cliff		///
Lion		///
Sed Seem		///
Deen Thompson	#1	///
Dr. J. 3		///

sun west	#11	///
1970 Calendar 'Suckers'		///
Suckly (the cream of the crop)	#2	///
Continental Cuties		/
Linnaeus Linna	#2	///
Living Doll	vol. 1 #2	///
Respect	#1	/
Honey Bee	vol 1 #2	/
Selectable	#1	///
Exotic		///
Exotic		///
Exotic in Color		/
New Cover Girl		/
Form in Color		///
Photographs Choice of Male & Female Models		/
Magazine	#2	///
Mail + Buttocks		/
A History & Analysis of Prostitution		///
Knock-Knocker who's there?		/
Exotic		///
Tooey Doney		///
Girl Companions		///
Girl Companions		///
Teenager Models		///
Roommate Wanted	vol 1 #1	///
Girl Fair	vol 6 #3	///
Offbeat	vol 1 #1	///
Black Silk Stockings	vol 5 #4	/
Penny's Pick-up Party	vol 1 #1	///
French Fills	vol 9 #1	///
Gay Bird Scene	#5	///
Rated Films	vol 1 #3	///
Infocus	vol 1 #1	///
Vol 1 #2		///

Fast	val 1	# 2	III
Fast		# 3	III
Wet & Wild	val 1	# 3	III
Scene (Gaylord)		# 6	III
Wild	val 1	# 6	III
Funny Films	val 4	# 1	II
(Lost for Life) Exposure and Design	# 16		III
Sally & Sandy & Sarah & Sue			III
Black Gowns		# 3	III
Broadside	val 5	# 4	III
(Gaylord) U.S.O.		# 18	III
Amateur (Gaylord)		# 5	III
Rated Films			II
El Scorchers	val 2	# 4	III
Fine Orleans	val 1	# 5	II
Inside Happening		# 24	II
Icon			I
Rock			III
The Bird Book			II
Bunty		# 14	III
Orgy			III
Secret Sent	val 1	# 1	I
Money			III
Pleasure Scenes	val 1	# 1	III
Naked Confessions	val 1	# 1	I
Raw - Confessions			III
Quinine Fair		# 3	III
Rebels			III
Exposure & Design # 14			III
Black Horse			II
Nude Epic		# 5	II
Naked Pleasure		# 5	II

Utopia	#24	---
Era. Trip	#4	---
Life	vol 2 #3	---
Raw. Confessions	vol 1 #2	---
Romper	vol 6 #4	---
Heavenly Bodies		---
Miss Leeds	vol #1 #2	1
(revised) Experiences	#14	---
Time + Form	#15	---
Yes	vol 2 #2	---
Wild Confessions	vol 1 #1	---
Lucky		---
Journal	#20	---
Campus	#7	---
Gorgeous Book ^{Gale}	#8	---
Widest Idea	#21	---
Brown Confessions		---
Celluloid Capers		---
Bachelor Party	vol 2 #2	---
Ever Ride	vol 2 #2	---
Lubilee	vol 1 #3	---
Gloria		11
Fiery Film	vol 3 #5	1
Flaming Film	#14	11
Focus		1
Seasons	vol 1 #9	---
Affair	vol 7 #1	---
Night Line	vol 2 #2	---
Astronomy		11
Amateur (daybird)	#4	11
Long		---
Tomcat	#2	---

from jungle	vol 3	#1	---
Wals			---
Wreath 1			---
Wreath			1
Wreath Capers		#5	1
Wreath		#6	---
Wreath	vol 7	#3	---
Wreath	vol 1	#3	---
Wreath Jaybird		#6	11
Wreath Birds	vol 3	#4	11
Wreath Affair	vol 1	#2	1111
Wreath Figure		#19	1
Wreath Together	vol 1	#1	111
Wreath Lady	same #1		111
Wreath Caters			1
Wreath		#13	1111
Wreath		#12	111
Wreath			11
Wreath			111
Wreath			1
Wreath	vol 9	#3	111
Wreath	vol 2	#2	111111
Wreath			111
Wreath		#14	1
Wreath	vol 1	#1	1
Wreath	vol 9	#1	111
Wreath	vol 4	#4	111
Wreath	vol 1	#3	11
Wreath	vol 1	#2	11
Wreath		#6	11
Wreath	vol 5	#2	111
Wreath	vol 1	#4	111111
Wreath		#3	11

Archives	vol 2	#3	III
Beauty Bayan	vol 2	#1	III
Beau	vol 1	#1	III
Best view	vol	#23	III
Elms, Special Edition			III
Girls, Glee		#10	II
Home Me	vol 1	#1	INT III
Lundish - 7			III
New Dawn	vol 1	#9	III
Not Clicks		#4	INT I
Widest - Time	vol 4	#5	III
Wish Passes	vol 2	#1	INT III
Home Me	vol 1	#1	I
Wishy Shop	vol 7	#1	III
Wishy Shop	vol 1	#3	II
31	vol 3	#2	I
Shocking Screen			INT I
Winter Girls	vol 4	#1	INT INT
Signs of Love		#1	III
Secret Song	vol 1	#1	II
Private Club 82	vol 1	#1	I
69. Blowout			III
Roulette	vol 4	#2	INT INT
Wishy Shop	vol 1	#2	INT III
Wishy Shop	vol 8	#3	I
Wishy Shop	vol 3	#6	I
Copper Cutie		#12	III
Wishy Shop	vol 3	#1	I
The Wild-Cats	vol 4	#2	INT INT
The Wild-Cats	vol 4	#1	INT II
Wishy Shop			III
Wishy Shop	vol 1	#4	II

Wanted			11
Rapture			"
Nude Rebels	vol 2	#2	111111
Swamp	vol 4	#1	"
The Jaybird Era		#3	1111
One Girl One	vol 1	#1	"
Brook Seven		#5	"
West + Wild	vol 1	#1	"
Blazing Films			"
Beauty Bazaar	vol 1	#3	111111
Cross Screen	vol 1	#2	"
Erin Screen	vol 1	#1	"
Hot Thrills		#3	"
Dr. Medist		#10	1111
Ecstasy			11
35/26/34	vol 7	#1	111
Scandia		#10	"
Femina		#3	111111
"		#10	"
Nude Living		#57	111
Pandulum			1111
Sunlife	vol 1	#10	111
Blazing Films	vol 4	#1	111
Two Girls Two	vol 2	#1	111
Torrent		#1	"
Nude. Love		#38	"
Belly Button	vol 1	#1	111111
Sal - 70		#23	1111
Baby + Seal	vol 3	#6	111111
Loch Diggins	vol 2	#2	111111
Base			
Highball	vol 2	#1	"
Nude Figure		#1	1111
Rev. Critic	vol 4	#1	111111

Rock Digger	vol 1	#1	III
Jaybirds, U.S.A.	vol 2	#1	III
Mad. Age		#17	III
Wild Fantasy	vol 1	#1	III
Bigon Party	vol 3	#1	III
Heads-up	vol 7	#1	III
Wild Caper	vol 1	#2	III
Wild Caper	vol 2	#1	I
Wild Caper			I
Wild Caper	vol 1	#5	III
Wild Caper	vol 3	#5	III
Wild Caper	vol 4	#1	III
Wild Caper		#57	III
Wild Caper	vol 1	#2	I
Wild Caper	vol 3	#5	III
Wild Caper		#5	III
Wild Caper	vol 2	#1	III
Wild Caper	vol 2	#1	III
Wild Caper	vol 4	#1	III
Wild Caper	vol 3	#6	I
Wild Caper	vol 3	#5	III
Wild Caper	vol 3	#4	I
Wild Caper			III
Wild Caper	Vol 4	#7	III
Wild Caper	vol 2	#1	III
Wild Caper	vol 1	#1	II
Wild Caper			III
Wild Caper	vol 2	#11	III
Wild Caper		#65	III
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 5- Teacher, Rusty Coat
 4- The Last Mischance
 5- Cheating Beards
 5- Blow the iron clays
 5- Minute Ministerial
 5- Cyprus Cat Coat
 5- The African Sun Tree
 5- The Carnal Crown
 1- Lushen School
 5- Eating Power
 5- Looking Up an Scept
 4- Washwater for Stupid
 4- Surber for Scept
 5- The Raptor
 5- Love in the City
 5- Tegan Christ Queens
 5- Night Marrow
 5- Love Thyself
 5- Soga of a Scept Murelle
 5- Monument to Remembrance
 5- Scept Turcoan
 4- The Sun in Lips

- 5- Remonant Mubato
 5- Baby Doll
 5- Wild Flower
 2- Three for Sep
 1- Three for All
 2- Melrose District
 4- From Infancy to Adulthood
 4- Sep Boston
 2- Mowen's of Lodi
 4- Guide to Lodi, Swapping
 5- Melrose in Cambridge
 5- Sep Ogden Illustrated
 1- Black in Color
 5- Journey of 9 Birds
 2- Wagon Vignettes
 2- Little Brown
 2- The Reader
 2- Whip Cream
 10- Egypt Picture of Abou's Gray Vol 2.
 2- Three for Sep
 2- The Tarantula Memorandum
 1- Fleck Merchant
 5- True Honey
 5- Swapper Convention
 5- Insect Street
 2- Baby Doll Books
 4- Fusion Ring
 2- Glass Factory
 4- Sep Hygiene and the Infant
 2- Chicago for Rust
 2- Taste of Love
 2- Undiscovered Pies
 5- Veronica
 5- Ten in the Fleck

- 5- Naked When We Meet
- 4 Love & Lust
- 3 Big Nova Revue
- 5 Delish
- 4 Lude
- 4 Kink By Lones
- 2 Burned Up, Beared Out
- 4 Free and Easy
- 4 Indecency
- 5 Spy Went Right
- 4 Got Down Hate
- 4 Pleasure Business
- 3 Border Town Sex
- 5 The Thawlon
- 4 Celestine
- 5 Prisons Physique
- 4 The Brothers
- 5 Successful Jones
- 4 European Delight
- 2 Dirty World
- 3 Routine You Want It
- 4 Hot, Hotter, Hottest
- 5 Diary of a Wicked Lady
- 5 Black Lust
- 3 Fugged Coughs
- 4 Showdown
- 5 Small Town Madness
- 3 Bad to Bed
- 1 Bad Studs
- 4 Lust & Love & Truth

- 5- Agent 067
- 4 Love in the City
- 4 Belling at Nye
- 5 Kiss get begin, Sam
- 5 The Wild Innocents
- 5 Melrose & Seven
- 5 Forbidden Women
- 4 The Playful Party
- 4 Everybodys Lady
- 5 Taming of R. C. T.
- 5 Served of Flesh
- 4 Pleasure Bound
- 3 French Affairs
- 5- Dance of Submission
- 3- Good Machine
- 4 Nevada Manoe
- 4 The Sex Commune
- 5 Horny Knuckle Red
- 5 Confessions of International Playboy
- 2 One Erotic Minute
- 3 Winter Royalty
- 5 Erotic Diary
- 4 Big Steel One
- 3 Sam ~~Good~~ Establishment
- 4 Carnival of Sex
- 5 Underground Orgy
- 3 Lolit
- 2 Lust of another Color
- 5 Sex for Two or More

- 4- A Day of Debauchery
- 1- Jovina Dury
- 1- Business as Usual
- 1- A Walk into Hell
- 1- Sin, Sex & Society
- 1- Absolutely Six Acts
- 4- I Like Mountain Woman
- 5- Sam Harty Taker
- 5- And One Then into the Lushells Port
- 3- Dennis the Sex Nurse
- 5- I am a Nut for Women
- 4- Knock Up with Tap
- 5- Wifely
- 4- The Exchange
- 9- Lance & Lianne
- 1- A History of Eroticism
- 5- Strange Love Pie
- 3- Linda's Strange Visions
- 4- Memoirs of Love
- 5- The Seducer
- 5- Sex Pictorial Through History
- 5- Sex Pictorial of African Tribes
- 5- The Women's Sex Guide
- 5- The Anatomy of Embrace
- 2- The Child Seeders
- 5- Heterosexuality
- 5- Pedestrian
- 2- Illustrated Case History V-1 #1
- 8- Pictorial Manual of Primary Positions
- 4- " " " " " " " " " " " "
- 4- Sex & Society #19

- 2 - Male Personals
- 6 - Exclusive In Colors
- 21 - Cover Girls
- 3 - Loney Doney
- 9 - Fuzzy Wuzzys

6-25-70

66 Books picked up by
the Bay County Sheriff's Department

MJ. Doffin Sheriff
By W. D. King
Deputy Sheriff

[fol. 266]

**In The United States District Court For The
Northern District of Florida
Pensacola Division
PCA 2224**

Robert Mitchum d/b/a The Book Mart, Plaintiff,


-vs-

**Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, M.J. "DOC" Daffin, as Sheriff of
Bay County, Florida, and The Honorable W.L.
Fitzpatrick, as Circuit Judge of the Fourteenth
Judicial Circuit in and for Bay County, Florida,
Defendants.**

**NOTICE OF HEARING
FOR TEMPORARY RESTRAINING ORDER,
CONTEMPT ORDER, RETURN OF MATERIALS
Filed: July 2, 1970 4:30 P.M.**

**TO: Clinton E. Foster, Esquire
Prosecuting Attorney
Bay County Courthouse
Panama City, Florida**

**Joe J. Harrell, Esquire
Harrell, Wiltshire, Bozeman,
Clark and Stone.
201 East Government Street
Pensacola, Florida
Attorney for Clinton E. Foster**



M.J. Doc Daffin
Sheriff of Bay County
Bay County Sheriff's Department
Panama City, Florida

Mayo C. Johnston, Esquire
406 Magnolia Avenue
Panama City, Florida
Attorney for M.J. Doc Daffin

The Honorable W.L. Fitzpatrick
Circuit Judge
Bay County Courthouse
Panama City, Florida

Raymond L. Marky, Esquire
Attorney General's Office
The Capitol
Tallahassee, Florida

PLEASE TAKE NOTICE that the Plaintiff, by his undersigned attorney, will call the above styled cause on for hearing for temporary restraining order seeking relief from W.L. Fitzpatrick's June 25, 1970 order, motion for leave to file supplemental complaint, and request to find all defendants in contempt of [fol. 267] court and return of seized materials, at 9:30 A.M. on the 8th day of July, 1970, before The Honorable Winston E. Arnow, in his Chambers, at the Federal Courthouse, Pensacola, Florida

PLEASE BE GOVERNED ACCORDINGLY.

I HEREBY CERTIFY that a true copy of the foregoing notice was furnished by mail to Clinton E. Foster, Esquire, Joe J. Harrell, Esquire, M.J. Doc Daffin, Mayo C. Johnston, Esquire, Raymond L. Marky, Esquire, and The Honorable W. L. Fitzpatrick at the above shown addresses, this 2nd day of July, 1970.

254

/s/

Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida

[fol. 268]

Value \$ <i>0.11</i>	Special Delivery \$
Reg. Fee \$ <i>0.11</i>	Return Receipt \$
Handling Charge \$	Restricted Delivery \$
Postage \$ <i>0.11</i>	<input checked="" type="checkbox"/> AIRMAIL
POSTMASTER (By) <i>[Signature]</i>	

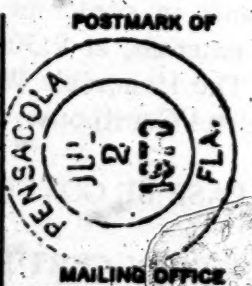


TO: EARL FAIRCLOTH
Capital Bldg
THUNDERBOLT FIA.
FROM U.S. District Ct.
Room 940
Pensacola FIA.

POD Form 3896, Dec. 1960 RECEIPT FOR REGISTERED MAIL

REGISTERED NO. *25211*

Value \$ <i>0.11</i>	Special Delivery \$
Reg. Fee \$ <i>0.11</i>	Return Receipt \$
Handling Charge \$	Restricted Delivery \$
Postage \$ <i>0.11</i>	<input checked="" type="checkbox"/> AIRMAIL
POSTMASTER (By) <i>[Signature]</i>	



FROM U.S. District Ct.
Room 940
Pensacola FIA.
TO CIV. CLERK
CAPITAL BLDG
THUNDERBOLT FIA.

POD Form 3896, Dec. 1960 RECEIPT FOR REGISTERED MAIL

[fol. 269]

In The United States District Court For The
Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster as
Prosecuting Attorney of Bay
County, Florida, et al., Defendants.

OBJECTION

Filed: July 8, 1970

1. COMES NOW the Defendant, M.J. "DOC" Daffin, as Sheriff of Bay County, Florida, and objects to the Motion of the Plaintiff for Leave to File Supplemental Complaint on the ground that the interests of justice do not require such Supplemental Complaint.

2. That the Supplemental Complaint will inject additional issues in this cause which are foreign to the main issue.

3. On the further ground that the issues will be too cumbersome to handle in one-law suit.

DAVENPORT, JOHNSTON
& HARRIS

Attorney for Defendant
M.J. "DOC" DAFFIN, as Sheriff
of Bay County, Florida

256

By /s/
Mayo C. Johnston
406 Magnolia Avenue
Panama City, Florida

Certificate of Service (omitted in printing)

[fol. 270]

In The United States District Court For The
Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, et al., Defendants.

MOTION TO STRIKE
Filed: July 8, 1970

COMES NOW the Defendant, M.J. "DOC" DAFFIN, as Sheriff of Bay County, Florida, and respectfully moves the Court subject to the Objection to Leave to File the Supplemental Complaint, respectfully moves to strike from the Supplemental Complaint (termed Amended Complaint) reference to this Defendant "individually" rather than as Sheriff of Bay County, Florida, particularly appearing in Line 6 of the first Paragraph and possibly in other paragraphs and further moves the Court to strike Paragraph 4 of the Complaint on the ground that there is no sufficient allegation

of any alleged violation of its previous orders upon which such a prayer could be based.

**DAVENPORT, JOHNSTON
& HARRIS**
Attorneys for Defendant
M.J. "DOC" DAFFIN, as
Sheriff of Bay County,
Florida

By /s/
Mayo C. Johnston,

Certificate of Service (omitted in printing)

[fol. 271]

In The United States District Court For The
Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney of
Bay County, Florida, et al., Defendants.

MOTION TO DISMISS
Filed: July 8, 1970

COMES NOW the Defendant, M.J. "DOC" DAFFIN, as Sheriff of Bay County, Florida, and subject to Objection for Leave to File Supplemental Complaint respectfully moves the

Court to dismiss the Supplemental Complaint (styled Amended Complaint) on the ground that the factual allegations contained therein are insufficient as a matter of law to charge this Defendant with contempt of Court or to entitle the Plaintiff to a further Restraining Order and to hold this Defendant in contempt of Court in that sufficient ultimate facts to state a cause of action in this regard are not alleged. This Court lacks jurisdiction of the subject matter hereof and this Defendant.

DAVENPORT, JOHNSTON
& HARRIS

Attorneys for Defendant
M.J. "DOC" DAFFIN, as
Sheriff of Bay County, Florida.

By /s/
May C. Johnston
406 Magnolia Avenue
Panama City, Florida

Certificate of Service (omitted in printing)

[fol. 272]

In The United States District Court For The
Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney of
Bay County, Florida, et al., Defendants.

MOTION

Filed: July 8, 1970

COMES NOW the Defendant, M.J. "DOC" DAFFIN, as Sheriff of Bay County, Florida, and represents to the Court as follows:

1. That on or about the 6th day of July, 1970, this Defendant was subpoenaed by the Plaintiffs in this cause to appear before this Court on the 8th day of June, 1970 at 9:30 o'clock P.M. At the time the said subpoena was served, this Defendant was not tendered a witness fee and mileage as provided by law. That on previous occasions this Defendant has been subpoenaed by Plaintiff to appear before this Court at various times and at no time has this Defendant been paid the witness fee and mileage provided by law.

WHEREFORE this Defendant prays that this Court enter an order directing the Plaintiff to pay over to this Defendant such witness fees and mileage as provided by law for each

time this Defendant has been subpoenaed to appear before this Court in the captioned matter.

**DAVEPORT, JOHNSTON
& HARRIS**
Attorneys for Defendant
M.J. "DOC" DAFFIN, as Sheriff
of Bay County, Florida.

By /s/
Mayo C. Johnston
406 Magnolia Avenue
Panama City, Florida

Certificate of Service (omitted in printing)

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED

JUL 1 1971

R. ROBERT SEAMER, CLERK

APPENDIX
VOLUME II OF II VOLUMES

Supreme Court of the United States

70-87

OCTOBER TERM, 1970

NO. 87

ROBERT MITCHUM, d/b/a THE BOOK MART,
APPELLANT,

vs.

CLINTON E. FOSTER, As Prosecuting Attorney of
Bay County, Florida; M. J. "DOC" DAFFIN, As
Sheriff of Bay County, Florida; and THE
HONORABLE W. L. FITZPATRICK, As Circuit
Judge of the Fourteenth Judicial Circuit in and
for Bay County, Florida,

APPELLEES.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

APPEAL FILED AUGUST 21, 1970

PROBABLE JURISDICTION NOTED MAY 3, 1971

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 876

ROBERT MITCHUM, d/b/a THE BOOK MART,
APPELLANT,

vs.

CLINTON E. FOSTER, As Prosecuting Attorney of
Bay County, Florida; M. J. "DOC" DAFFIN, As
Sheriff of Bay County, Florida; and THE
HONORABLE W. L. FITZPATRICK, As Circuit
Judge of the Fourteenth Judicial Circuit in and
for Bay County, Florida,

APPELLEES.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA -
PENSACOLA DIVISION

VOLUME II OF II VOLUMES

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Supreme Court of the United States

OCTOBER TERM, 1970

NO. 876

ROBERT MITCHUM, d/b/a THE BOOK MART,
APPELLANT,

vs.

CLINTON E. FOSTER, As Prosecuting Attorney of
Bay County, Florida; M. J. "DOC" DAFFIN, As
Sheriff of Bay County, Florida; and THE
HONORABLE W. L. FITZPATRICK, As Circuit
Judge of the Fourteenth Judicial Circuit in and
for Bay County, Florida,

APPELLEES.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

[fol. 273]

In the United States District Court for the
Northern District of Florida
Pensacola Division
PCA 2224

ROBERT MITCHUM d/b/a THE BOOK MART
Plaintiff,

-v-

CLINTON E. FOSTER, as Prosecuting
Attorney of Bay County, Florida,
M. J. "DOC" DAFFIN, as Sheriff of
Bay County, Florida, and THE
HONORABLE W. L. FITZPATRICK, as
Circuit Judge of the Fourteenth
Judicial Circuit in and for Bay
County, Florida,
Defendants.

MOTION TO DISMISS

Filed: July 8, 1970

Defendants W. L. Fitzpatrick, as Circuit Judge, and Clinton E. Foster, as Prosecuting Attorney of Bay County, Florida, move that the court dismiss the complaint as amended and/or supplemented on the ground of lack of jurisdiction over the subject matter, said ground being more particularized as follows:

I.

The subject matter of this suit arises out of certain alleged actions by defendants in connection with civil litigation instituted in the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, styled State of Florida, Plaintiff, -vs- Robert Mitchum, et al.,

Defendants, Case No. 70-292 (B), as reflected by the court file herein. Defendant Fitzpatrick, in his capacity as Circuit Judge, entered a restraining order in said cause on April 6, 1970, and an order to show cause on May 29, 1970. [fol. 274] Both of these orders in the state court have been the subject of temporary restraining orders issued by this court.

Notwithstanding the fact that the plaintiffs herein are attempting to litigate purported federally protected rights in this proceeding, the plaintiffs at the same time are actively litigating those same federal issues in the state courts of Florida. Upon the entry of the order by Judge Fitzpatrick on April 6, 1970, the plaintiffs herein, (Mitchum, et al.), filed a notice of interlocutory appeal from that order to the District Court of Appeal, First District of Florida. A certified copy of said interlocutory appeal is attached hereto as Exhibit A. Attached hereto as Exhibit B is a certified copy of the assignments of error also filed in the District Court of Appeal by plaintiffs herein. In these assignments of error substantial federal questions are raised. In the pleading filed by plaintiffs herein on or about July 2, 1970, a subsequent order issued by Defendant Fitzpatrick is sought to be enjoined. This order by Judge Fitzpatrick was entered on June 25, 1970. Again, the plaintiffs in this case took an interlocutory appeal from the June 25th order of Judge Fitzpatrick to the District Court of Appeal, First District of Florida, and a certified copy of said notice of interlocutory appeal is attached hereto as Exhibit C. A certified copy of the assignments of error filed in said cause is attached hereto as Exhibit D. Said assignments of error raise substantial federal issues.

In light of the foregoing, it is clear that the plaintiffs in this case are attempting to simultaneously litigate their federal claims in both the state courts of [fol. 275] Florida and this federal court. Such an attempt violates the jurisdictional mandate of the United States Supreme Court in *England v. Louisiana Medical Examiners*, 375 U.S. 411 (1964). In *England*, the court held that:

"... if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court." 375 U.S. at 419.

Inasmuch as the plaintiffs in this case have elected, without reservation, to litigate their federal claims in the state courts of Florida, they have forfeited their right to raise those same claims here. Any doubts as to the present vitality of *England*, supra, are put to rest in *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, U.S. (June 8, 1970), in which the Supreme Court cited *England* with approval in regard to the proposition that a party may restrict his complaint in the state court to state grounds alone while reserving federal claims to the federal courts. Plaintiffs here have failed to make a reservation of their federal claims in the state court and are actively litigating both state and federal claims in the state court. Accordingly, they have forfeited their right to an adjudication of federal claims here and this court is without jurisdiction in this cause.

II.

On behalf of Defendant, W.L. Fitzpatrick as Circuit Judge, it has also been argued in this court that a state circuit judge is absolutely immune from suit under the Civil Rights Act, § 1983 of 42 U.S.C. Said defendant hereby renews [fol. 276] the argument previously made on this ground and moves that he be dismissed as a defendant on the authority of *Pierson v. Ray*, 386 U.S. 547. This assertion is fortified by the decision in *Atlantic Coast Line R. R. Co. v. Brotherhood of Locomotive Engineers*, supra, in which the court stated:

"***Again, lower federal courts possess no power whatever to sit in direct review of state court decisions. If the union was adversely affected by the state court's decision, it was free to seek vindication

of its federal right in the Florida appellate courts and ultimately, if necessary, in this Court. Similarly if, because of the Florida Circuit Court's action, the union faced the threat of immediate irreparable injury sufficient to justify an injunction under usual equitable principles, it was undoubtedly free to seek such relief from the Florida appellate courts and might possibly in certain emergency circumstances seek such relief from this Court as well. Cf. *Natural Gas Co. v. Public Serv. Comm'n*, 294 U.S. 698 (1935); *United States v. Moscow Fire Ins. Co.*, 308 U.S. 542 (1939); R. Robertson & F. Kirkham, *Jurisdiction of Supreme Court* § 441 (R. Wolfson & P. Kurland ed., 1951). Unlike the Federal District Court, this Court does have potential appellate jurisdiction over federal questions raised in state court proceedings and that broader jurisdiction allows this Court correspondingly broader authority to issue injunctions "necessary in aid of its jurisdiction."

Atlantic Coast Line, *supra*, also cites with approval *Donovan v. Dallas*, 377 U.S. 408 (1964), in which the court held that neither the state nor federal courts have general injunctive power over the other's proceedings.

III.

Defendants hereby renew and reassert all grounds previously urged in their motion to vacate temporary restraining [fol. 277] orders filed herein on or about June 19, 1970.

/s/ EARL faircloth
Attorney General

/s/ RAYMOND L. MARKY
Assistant Attorney General
Co-counsel for Clinton E.
Foster and counsel for
Honorable W. L. Fitzpatrick

/s/MICHAEL J. MINERVA
Assistant Attorney General
Counsel for Honorable
W. L. Fitzpatrick

The Capitol
Tallahassee, Florida 32304

[fol. 279] Certificate of Service (omitted in printing)

[fol. 279]

In the Circuit Court, Fourteenth Judicial Circuit
of The State of Florida, in and for Bay County

State of Florida, Plaintiff,

-v-

Robert Mitchum, Dave Ballue,
Clarence Howard Cantey, a business
known as The Book Mart, a certain
portion of land and building located
at 19 Harrison Avenue, Panama City,
Florida, and all other persons claiming
any right, title or interest in the
property affected by this action, Defendants.

NOTICE OF INTERLOCUTORY APPEAL—Filed April 9, 1970

Robert Mitchum, Dave Ballue, Clarence Howard Cantey, a
business known as The Book Mart, a certain portion of land
and building located at 19 Harrison Avenue, Panama City,
Florida, and all other persons claiming any right, title or
interest in the property affected by this action, Defendants,
take and enter their interlocutory appeal to the District Court
of Appeal, First District of Florida to review the order,
judgment or decree of the Circuit Court for Bay County,

Florida, bearing the date of April 6, 1970, and entered and recorded in Circuit Court Minute Book 33 at page 681 on April 6, 1970. The nature of the order appealed from is an interlocutory order in equity enjoining the Defendants from the sale of presumptively protected materials where there has been no judicial determination of obscenity as to thousands of publications contained therein and there has been no grounds presented justifying on the basis of a nuisance a temporary injunction as issued. All parties to the cause are called upon to take notice of the entry of this interlocutory appeal.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail to Clinton E. Foster, Esquire, County Prosecutor, Bay County, 1610 Beck Avenue, Panama City, Florida, this 6th day of April, 1970.

/s/Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida
Attorney for Defendants

[fol. 280]

In the Circuit Court, Fourteenth Judicial Circuit
of The State of Florida, in and for Bay County
Case No. 70-292

State of Florida, Plaintiff,

—vs—

Robert Mitchum, Dave Ballue, Clarence Howard Cantey, a business known as The Book Mart, a certain portion of land and building located at 19 Harrison Avenue, Panama City, Florida, and all other persons claiming any right, title or interest in the property affected by this action, Defendants.

ASSIGNMENTS OF ERROR—
Filed April 7, 1970

Defendants assign and designate as error the following judicial acts in the lower court:

1. No prior judicial adversary hearing was held prior to the seizure of materials by the prosecutor who had issued a subpoena Duces Tecum.
2. The Court erred in denying Defendant's motion to suppress evidence other than that purchased or procured legally.
3. That the Temporary Injunction issued by the Circuit Court for the Fourteenth Judicial Circuit in and for Bay County, Florida, on April 6, 1970, pursuant to the constitutionally deficient application of the said state obscenity and nuisance statutes, is likewise constitutionally defective, cannot be legally tolerated, and this Court should

so adjudge said Temporary Injunction to be constitutionally invalid and enjoin the enforcement thereof on the grounds that:

A. There was not sufficient and credible evidence presented to Judge Fitzpatrick that any one or all of the witnesses were qualified to testify as expert witnesses on even the two tests of whether the publications submitted into evidence as exhibits would "exceed the limits of candor tolerated in the national community as a whole in the representation or depiction of matters pertaining to sex and/or nudity" or would "appeal to [fol. 281] the prurient interest of the average intended recipient considered as a whole," and

B. There was no evidence whatsoever presented to Judge Fitzpatrick that would show that the publications entered into evidence as exhibits were "utterly without redeeming social value", as is constitutionally required; and

C. There was no evidence presented to Judge Fitzpatrick limiting consideration of the exhibits to only hard core pornography; and

D. There was no evidence presented to Judge Fitzpatrick upon which he could base his Temporary Injunction, limiting the case to consideration of evidence of the sort of pandering proscribed by the Supreme Court of the United States in *Ginzburg vs. U.S.*, 363 U.S. 304 (1966).

4. The Court erred in denying Defendant's motion to strike testimony of Police Chief Thomas Jerry McAuley.

5. The Court's finding of nuisance is unsupported by evidence in the record.

6. The abatement of a nuisance, if it exists, which it does not, is not sufficient justification for a prior restraint of First Amendment freedoms by injunction.

7. § 847.011 is void for impermissible overbreadth for the following reasons:

A. It creates an unconstitutional presumption under Sub-Section (1) (b) that, "The knowing possession by any person of six or more identical or similar materials...coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph," which presumption could be applied by Defendants to constitutional private possession (See *Stanley v. Georgia*, 394 U.S. 557 (1969) as well as to commercial possession for distribution to adults only in a non-obtrusive manner not encroaching on [fol. 282] the rights of others who wish to avoid confrontation with the adult-type materials. Said presumption permits law enforcement officials to charge citizens of the State of Florida with possession of purportedly obscene materials where there is no direct evidence of any criminal speech.

B. It fails to distinguish between constitutionally protected personal possession and public possession of materials alleged to be obscene.

C. It does not require the prosecutor to affirmatively prove that the Defendant had actual knowledge of the contents and character of the purportedly obscene material.

D. It permits an *ex parte* temporary restraining order without notice to the person complained of and an opportunity on the part of such person to participate in such a proceeding or as in this case an insufficient notice and inadequate time to prepare, and the suppression of presumptively protected First Amendment materials may and has been imposed pending judicial review, however protracted, and there is no assurance of prompt judicial determination of the obscenity *vel non* of such materials.

E. It does not require the complainant to affirmatively prove "scienter" or knowledge of the character and contents of the alleged obscene materials on the part of

the respondent but contains an unconstitutional presumption that after respondent is served with a summons and complaint in such a proceeding, he is chargeable with knowledge of the contents and character of the purportedly obscene materials.

8. §823.05 and Title 6, §60.05 are unconstitutional and are repugnant to the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States as written and/or as the same have been employed and applied by said Plaintiffs against your Defendant/Appellants, in that:

[fol. 283] A. Said statutes are void because the standards therein permitting the maintenance or expression to be enjoined and declared to be a nuisance solely on the grounds that the same "tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals of the people" are unconstitutionally vague and broad and therefore are in violation of the First and Fourteenth Amendments to the Constitution of the United States; and

B. Said statutes are void because the terms "nuisance" and "annoy the community" and "injure the health of the community" or "become manifestly injurious to the morals of the people" contained therein are so vague, indefinite, and broad that they do not afford any reasonable standards for the imposition of restraints upon freedom of expression and therefore are repugnant to the guarantees of the First and Fourteenth Amendments to the Constitution of the United States; and

C. Said nuisance statutes when applied to the operation of the place of business by your Defendants/Appellants, and the subject matter sold therein, violate the First and Fourteenth Amendments to the Constitution of the United States because of the absence of the following procedural safeguards required by the decisions of the Supreme Court of the United States and other federal courts:

1. There is no requirement or assurance therein, or in any other provision of the laws of Florida, for a prompt judicial decision, including appellate review, of the question of whether the actions described in Section 823.05 is a "nuisance" which may be restrained thereunder; and,

2. There is no provision in said statute, or elsewhere in the law of Florida, which requires or assures that any restraint of the described action [fol. 284] of the said Plaintiff shall be postponed until a judicial determination of the question of nuisance (in this case applying the doctrine of obscenity in a nuisance statute) following notice and an adversary hearing.

D. Said nuisance statutes are void as written and as applied because there has been established thereby no precise objective standards by which the work restrained or objected to may be judged as well as procedural safeguards adequate to insure that constitutionally protected expression will not be dully curtailed.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail to Clinton E. Foster, Esquire, County Prosecutor, Bay County, 1610 Beck Avenue, Panama City, Florida, this 6th day of April, 1970.

/s/Paul Shimek, Jr.
Attorney for Defendants
517 North Baylen Street
Pensacola, Florida

[fol. 285]

In the Circuit Court, Fourteenth Judicial Circuit
of the State of Florida, in and for Bay County—
Case No. 70-292 (B)

State of Florida, Plaintiff,

—vs—

Robert Mitchum, Dave Ballue, Clarence Howard Cantey, a business known as The Book Mart, a certain portion of land and building located at 19 Harrison Avenue, Panama City, Florida, and all other persons claiming any right, title or interest in the property affected by this action, Defendants.

NOTICE OF INTERLOCUTORY APPEAL—
Filed June 30, 1970

Robert Mitchum, Dave Ballue, Clarence Howard Cantey, a business known as The Book Mart, a certain portion of land and building located at 19 Harrison Avenue, Panama City, Florida, and all other persons claiming any right, title or interest in the property affected by this action, Defendants, take and enter their interlocutory appeal to the District Court of Appeal, First District of Florida to review the order, judgment or decree of the Circuit Court for Bay County, Florida, bearing the date of June 25, 1970, and entered and recorded in Circuit Court Minute Book 34 at page 526 on June 25, 1970. The nature of the order appealed from is an interlocutory order in equity ordering the seizure of all publications, obscene and nonobscene, offered for sale by the Defendants, the impounding of same, and the enjoining and restraining from selling or offering for sale any publications named or other publications, and there having been no

judicial determination of obscenity as to thousands of publications contained therein and there has been no grounds presented justifying on the basis of a nuisance a temporary injunction as issued. All parties to the cause are called upon to take notice of the entry of this interlocutory appeal.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail to Clinton E. Foster, Esquire, County [fol. -286] Prosecutor, Bay County, 1610 Beck Avenue, Panama City, Florida, this 26th day of June 1970.

/s/Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida
Attorney for Defendants

[fol. 287]

In the Circuit Court, Fourteenth Judicial Circuit
of the State of Florida, in and for Bay County
Case No. 70-292 B

State of Florida, Plaintiff,

—vs—

Robert Mitchum, Dave Ballue, Clarence Howard
Cantey, a business known as The Book Mart, a
certain portion of land and building located at 19
Harrison Avenue, Panama City, Florida, and all other
persons claiming any right, title or interest in the
property affected by this action, Defendants.

ASSIGNMENTS OF ERROR—

Filed July 2, 1970

Defendants assign and designate as error the following
judicial acts in the lower court:

1. No prior judicial adversary hearing was held prior to
the seizure by subpoena of materials by the prosecutor who
had issued same, requiring the production of same at trial.

2. The Court erred in ordering defendant's counsel to
produce the exhibits and place same into evidence.

3. That the seizure, impounding and injunction issued by
the Circuit Court for the Fourteenth Judicial Circuit in and
for Bay County, Florida, on June 25, 1970, pursuant to [fol.
288] the constitutionally deficient application of the said
state obscenity and nuisance statutes, is likewise
constitutionally defective, cannot be legally tolerated, and this
Court should so adjudge said seizure, impounding and

injunction to be constitutionally invalid and enjoin the enforcement thereof on the grounds that:

A. There was no evidence presented to Judge Fitzpatrick on the issue of whether the publications submitted into evidence as exhibits would "exceed the limits of candor tolerated in the national community as a whole in the representation or depiction of matters pertaining to sex and/or nudity" or would "appeal to the prurient interest of the average intended recipient considered as a whole", or were "utterly without redeeming social value", as is constitutionally required; and

B. There was no evidence presented to Judge Fitzpatrick limiting consideration of the exhibits to only hard core pornography; and

C. There was no evidence presented to Judge Fitzpatrick upon which he could base his Temporary Injunction, limiting the case to consideration of evidence of the sort of pandering proscribed by the Supreme Court of the United States in *Ginzburg v. U.S.*, 363 U.S. 304 (1966). [fol. 289]

4. The Court's finding that the operation of such business is prima facie injurious and damaging to the morals and manners of the people of the State of Florida and are subversive to public order and decency and prima facie constitute a public nuisance and if permitted to continue will do irreparable harm and damage to the morals and welfare and safety of the people of the State of Florida is unsupported by evidence in the record.

5. The abatement of a nuisance, if it exists, which it does not, is not sufficient justification for a prior restraint of First Amendment freedoms by injunction.

6. §847.011 is void for impermissible overbreadth for the following reasons:

A. It creates an unconstitutional presumption under Sub-Section (1) (b) that, "The knowing possession by any person of six or more identical or similar materials. . . coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph, "which presumption could be applied by Defendants to constitutional private possession (See *Stanley v. Georgia*, 394 U.S. 557. (1969) as well as to commercial possession for distribution to adults only in a non-obtrusive manner not encroaching on the rights of others, who wish to avoid confrontation with the adult-type materials. Said presumption permits [fol. 290] law enforcement officials to charge citizens of the State of Florida with possession of purportedly obscene materials where there is no direct evidence of any criminal speech.

B. It fails to distinguish between constitutionally protected personal possession and public possession of materials alleged to be obscene.

C. It does not require the prosecutor to affirmatively prove that the Defendant had actual knowledge of the contents and character of the purportedly obscene material.

D. It permits an *ex parte* temporary restraining order without notice to the person complained of and an opportunity on the part of such person to participate in such a proceeding or as in this case an insufficient notice and inadequate time to prepare, and the suppression of presumptively protected First Amendment materials may and has been imposed pending judicial review, however protracted, and there is no assurance of prompt judicial determination of the obscenity *vel non* of such materials.

E. It does not require the complainant to affirmatively prove "scienter" or knowledge of the character and contents of the alleged obscene materials on the part of the respondent but contains an unconstitutional presumption that after respondent [fol. 291] is served with a summons and complaint in such a proceeding, he is chargeable with knowledge of the contents and character of the purportedly obscene materials.

7. §823.05 and Title 6, §60.05 are unconstitutional and are repugnant to the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States as written and/or as the same have been employed and applied by said Plaintiffs against your Defendant/Appellants, in that:

A. Said statutes are void because the standards therein permitting the maintenance or expression to be enjoined and declared to be nuisance solely on the grounds that the same "tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals of the people" are unconstitutionally vague and broad and therefore are in violation of the First and Fourteenth Amendments to the Constitution of the United States; and

B. Said statutes are void because the terms "nuisance" and "annoy the community" and "injure the health of the community" or "become manifestly injurious to the morals of the people" contained therein are so vague, indefinite, and broad that they do not afford any reasonable standards for the imposition of restraints upon freedom of expression and therefore are repugnant [fol. 292] to the guarantees of the First and Fourteenth Amendments to the Constitution of the United States; and,

C. Said nuisance statutes when applied to the operation of the place of business by your Defendants/Appellants, and the subject matter sold therein,

violate the First and Fourteenth Amendments to the Constitution of the United States because of the absence of the following procedural safeguards required by the decisions of the Supreme Court of the United States and other federal courts:

1. There is no requirement or assurance therein, or in any other provision of the laws of Florida, for a prompt judicial decision, including appellate review, of the question of whether the actions described in Section 823.05 is a "nuisance" which may be restrained thereunder; and,

2. There is no provision in said statute, or elsewhere in the law of Florida, which requires or assures that any restraint of the described action of the said Plaintiff shall be postponed until a judicial determination of the question of nuisance (in this case applying the doctrine of obscenity in a nuisance statute) following notice and an adversary hearing.

D. Said nuisance statutes are void as written and as applied because there has been established thereby no [Fl. 293] precise objective standards by which the work restrained or objected to may be judged as well as procedural safeguards adequate to insure that constitutionally protected expression will not be unduly curtailed.

Certificate of Service (omitted in printing).

/s/Paul Shimiek, Jr.
517 North Baylen Street
Pensacola, Florida
Attorney for Defendants

[fol. 294]

In the United States District Court for the
Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, M. J. "DOC" DAFFIN, as Sheriff of
Bay County, Florida, and The Honorable W. L.
Fitzpatrick, as Circuit Judge of the Fourteenth
Judicial Circuit in and for Bay County, Florida,
Defendants:

ORDER—Filed July 8, 1970

Pursuant to directions of the three judges constituting this
Court, and as order of such Three-Judge Court, it is

ORDERED:

1. Plaintiff's motion for leave to file supplemental
complaint herein filed on July 2, 1970, is granted, and the
amended complaint sought to be filed herein by such motion
is filed herein.

2. Defendants have twenty (20) days from the date
hereof within which to serve, and at the same time or
immediately thereafter file, responsive pleading.

3. In the event no responsive pleading is so served and
filed by Defendants, such other pleadings as have been herein

filed by such Defendants shall respectively stand over and be addressed to such amended complaint now allowed to be filed.

DONE AND ORDERED this 8th day of July, 1970.

/s/WINSTON E. ARNOW
United States District Judge

[fol. 295]

In the United States District Court for the
Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum d/b/a The Book Mart, Plaintiff

vs.

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, M. J. "DOC" DAFFIN, as Sheriff of
Bay County, Florida, and The Honorable W. L.
Fitzpatrick, as Circuit Judge of the Fourteenth
Judicial Circuit in and for Bay County, Florida,
Defendants.

ORDER—Filed July 8, 1970

This matter came on for hearing before the undersigned judge on the notice of hearing for temporary restraining order herein filed on July 2, 1970. The undersigned judge has already heard argument on motion to dissolve the temporary restraining orders entered herein on May 12, 1970, and June 5, 1970, and has such under advisement.

At the hearing today, certain motions were filed by Defendants M. J. Daffin, as Sheriff, W. L. Fitzpatrick as Circuit Judge, and Clinton E. Foster as Prosecuting Attorney, of Bay County, Florida. There was also filed an "Objection" by Defendant Daffin to motion of Plaintiff for leave to file supplemental complaint.

By order at hearing, the Court has granted motion for leave to file supplemental complaint, as the order of the Three-Judge Court, so that such objection has been decided. The other motions have not been determined.

[fol. 296] The undersigned judge has concluded that he, as a single judge, should take no action on the application for temporary restraining order heard at this time, and should withhold ruling on the motions to dissolve the prior restraining orders, pending hearing on all these matters by the full Three-Judge Court. At such hearing, there will also be heard and determined the foregoing motions referred to herein.

This order is made after consultation with the other two judges comprising the Three-Judge Court.

It is, in view of the foregoing,

ORDERED:

1. Plaintiff's application for preliminary injunction, contained in the amended complaint, as well as the application for preliminary injunction contained and involved in pleadings previously filed and in connection with which the prior restraining orders referred to herein were entered, as well as hearing on the motions referred to herein, are each set for hearing before the Three-Judge Court in the Federal Courtroom at Tallahassee, Florida, on Thursday, July 16, 1970, with court convening at 10:00 a.m. EDT for that purpose.

2. The Clerk shall immediately send copies of this order to all defendants and interested parties, and such copies shall serve as notice to them of this hearing.

DONE AND ORDERED this 8th day of July, 1970.

/s/WINSTON E. ARNOW
United States District Judge

[fol. 297]

In the United States District Court for the
Northern District of Florida
Pensacola Division
Pensacola Civil Action No. 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff

vs.

Clinton E. Foster, as Prosecuting Attorney of Bay County, Florida; M. J. "DOC" DAFFIN, as Sheriff of Bay County, Florida, and the Honorable W. L. Fitzpatrick, as Circuit Judge of the Fourteenth Judicial Circuit in and for Bay County, Florida, Defendants.

HEARING ON TEMPORARY RESTRAINING ORDER
Filed July 10, 1970

Before:

Honorable Winston E. Arnow
United States District Judge
U. S. Post Office &
Courthouse, Pensacola, Fla.
July 8, 1970
9:36 o'clock a.m.

Appearances:

Paul Shimek, Esquire
517 N. Baylen Street, Pensacola, Fla.,
Appearing on behalf of the Plaintiff.

Joe J. Harrell, Esquire
201 E. Government St., Pensacola, Fla.
Appearing on behalf of Clinton E. Foster

Mayo C. Johnston, Esquire
406 Magnolia Avenue, Panama City, Fla.
Appearing on behalf of M. J. "Doc" Daffin

Michael J. Minerva, Esquire
Attorney General's Office, The Capitol,
Tallahassee, Florida
Appearing on behalf of The Honorable
W.L. Fitzpatrick

[fol. 298]

(The Court) Mr. Clerk, let the record show that this matter is involved in the suit of Robert Mitchum and so forth, plaintiff, versus, Clinton Foster and so forth, defendants, being P.-C. A. 2224. The matter comes before the Court on Notice of Hearing filed by the plaintiff's attorney for temporary restraining order and contempt order and return of material, and it is also before the Court on motion for leave to file supplemental motion for the plaintiff. That motion was not served, was it?

(Mr. Shimek) Yes, Your Honor. The written motion would reflect that all motions, everyone was notified and everyone has received a copy on all matters.

(The Court) Let me say this to you at the outset of this matter, I talked preliminarily with counsel in chambers on this matter. I think this suit is in the position and status where this hearing on application for temporary restraining order as well as on the question of whether the prior restraining orders entered by me as Judge should be converted as matter that should be resolved by the three-judge court. In

that connection, as I told counsel in chambers, I have discussed this [fol. 299] matter with Judge Simpson and Judge Scott who are the other Judges, and I have a hearing set next Thursday at 10:00 a.m. for this purpose and the hearing will also include a hearing on the question of whether the prior restraining orders of this court should be put in form of preliminary injunction or should be dissolved. That, of course, whatever action is taken by the three-judge court will, of course, leave its action either granting preliminary injunction or denying it in appealable fashion under the rules to the Supreme Court for whichever party is adversely affected by it and wishes to take that appeal, and the question of contempt is not to be considered by me to any degree at this hearing this morning. In that connection what I propose to do this morning is to grant this motion with leave to file this amended complaint. Now, my reason for granting this motion is this, that that being so we can take whatever evidence necessary or desired by the parties in connection with this application so that we have that much done today and so that it will be available for the three Judges at the time of the hearing and the time of the three Judges will be saved at that hearing, and I do not believe we could [fol. 300] do that properly unless that amended complaint were allowed because there would be no element to be considered, and I have also discussed that with Judges Scott and Simpson and they seem to think that is appropriate also in the light that it is set before the three-judge court.

One final thought I did have and we discussed a little bit was this, under this setup perhaps it would be appropriate to take a recess at this hearing with the end in view that counsel might be able to stipulate between themselves on many of the facts that are going to be presented and save testimony, and I have the feeling there is little dispute on what has transpired factually in connection with this litigation and would propose we try to work it out that way and go ahead and take this recess and give you what time you need to try to stipulate on the facts, and the Court will be available and I will give you

some facilities in which to sit and we can get back together. Do any of you have any points to present to me in connection with what I said?

(Mr. Shimek) I have nothing.

(The Court) Any of you for the defendant?

[fol. 301] (All signified negative.)

(The Court) Very well, sir, I am going to draw an order allowing this amended complaint to be filed and I will get that done and give the defendants twenty days and we will be having a hearing next Thursday in Tallahassee. There were some motions some of you wanted to file?

(Mr. Minerva) We would like to file these in the record and these matters should be determined by the three-judge court at the same time.

(The Court) Mr. Johnson, you have some too?

(Mr. Johnson) Just for the Court here.

(The Court) Would you like to file them now?

(Mr. Johnson) Thank you. I have already served copies on Mr. Shimek.

(The Court) Are there any other matters you want to take up before recessing ladies and gentlemen? Do you want to try to set a time to get back together, around thirty or forty minutes - 10:30? Suppose I just hold myself available for your call and you send word to me.

(Mr. Harrell) I don't believe it will take more than 10 minutes. I just discussed it with counsel.

[fol. 302] (The Court) Mr. Shelby, see that the jury room is available for them and they can all sit around the table in there and I will be in recess pending your call.

Whereupon court recessed and reconvened at 10:15 a.m.

(The Court) Please be seated. Gentlemen, in the interim while we have been in recess I have drafted this order.

"Pursuant to directions of the three Judges constituting this Court, and as the order of such Court, it is ordered:

"1. Plaintiff's motion for leave to file supplemental complaint herein filed on July 2, 1970 is granted, and the amended complaint sought to be filed herein by such motion is filed herein.

"2. Defendants have 20 days from the date hereof within which to serve, and at the same time or immediately thereafter file, responsive pleading.

"3. In the event no responsive pleading is so served and filed by defendants, such other pleadings as have been herein filed by such defendants shall respectively stand over and be addressed to such amended complaint now allowed [fol. 303] "to be filed."

I wanted to leave you free to file anything you wanted to and you will have answers that will stand up. Does that sound all right informally?

(All signified affirmative.)

(The Court) I will go ahead and sign this order and get it in the file, Mr. Clerk. Mr. Clerk, you will get copies.

(The Clerk) Yes, sir.

(The Court) Now, how do we start here?

(Mr. Shimek) Your Honor, I will speak toward the stipulation. It is my understanding that all parties stipulate to the following:

1. That Exhibit 10, the record which is a transcript of the proceedings before Judge Fitzpatrick is stipulated to in toto subject to Scrivener's errors. Page 36 it should be precedent and apparently minor Scrivener's errors. We will try to get those together later. Basically we have agreed Exhibit 10, the transcript, is in evidence.

(The Court) Will you hold it for me a moment. Exhibit 10 -

(Mr. Shimek) Is that which you have before you.

(fol. 304] (The Court) Which is a record of some proceedings held before Judge Fitzpatrick and it is stipulated that is in evidence. Is that correct?

(Mr. Shimek) Right.

(The Court) That is correct for the counsel for defendants?

(All counsel for defendants signified affirmative.)

(Mr. Shimek) Secondly, Exhibit 11 which is Judge Fitzpatrick's June 25 order, speaks for itself and is submitted for that record.

(The Court) Exhibit 11 we can consider as a true copy in evidence before the Three-Judge Court, is that correct?

(All signified affirmative.)

(Mr. Shimek) Lastly, that Exhibit No. 13, the affidavit of employee John C. Martin, consisting of four typed pages sworn to with an attachment of many, many pages demonstrating, in fact, all of the documents and publications that were seized by the Sheriff -

(The Court) You have me a little lost. I have plaintiff's 12 John C. Martin.

(Mr. Shimek) Yes, sir.

[fol. 305] (The Court) Exhibit -

(Mr. Shimek) Which means there is attached to that affidavit the entire list of everything that was seized, namely, everything in the store.

(The Court) Let me back up a moment. Well, on preliminary injunction, of course, an affidavit could be considered by the court on injunction without stipulation, but I assume we are carrying it a step further and stipulating in fact the list attached to that affidavit is a correct copy of the list of the matters which were seized?

(Mr. Shimek) Yes, Your Honor. It was compiled by the Defendants themselves.

(The Court) Gentlemen, is that correct?

(Counsel indicating affirmative.)

(The Court) The stipulation is that this is, in fact, this list attached to Exhibit 12, is, in fact, a true and correct list of the items and magazines or whatever that were seized by the Sheriff as set forth in the affidavit of Martin.

(Mr. Shimek) Martin, yes.

(The Court) Is that correct?

(Counsel indicating affirmative.)

[fol. 306] (Mr. Shimek) Lastly there was an error in the spelling of Deputy Barfield's name, it is Bearfield, B-e-a-r-f-i-e-l-d, in the phonetic sounding where the word "Barfield" appears it should be B-e-a-r-f-i-e-l-d.

(The Court) Is that correct?

(All counsel indicating affirmative.)

(The Court) What else do we have?

(Mr. Shimek) We would stipulate to some Scrivener's errors, but Mr. Foster and I will review that and try to submit something.

(The Court) I don't think Scrivener's errors are very important. It could be important, but you and Mr. Foster could present a stipulation before the hearings.

(Mr. Shimek) It is a minor thing we can agree on.

(The Court) What else do we need to consider?

(Mr. Shimek) I don't recall anything other than the record at this point.

(The Court) Looking at this paragraph of the amended complaint

(Mr. Shimek) As to the amended complaint they have read it and there are probably about two or three sentences in the complaint that we [fol. 307] cannot agree on. One is on the first page, the number of publications in question. 228 was produced. There is some question if, in fact, 228 were required to be produced. I think 219 or so were required.

(The Court) Is that correct, sir? It would seem to me if we are getting into the question of mass seizures the difference between 219 and 222 would make that much difference.

(Mr. Shimek) It leaves question. We were ordered to produce 228 publications, which we were ordered to produce into the bosom of the Court that which we had with us, which was 228. We prior to that were required to produce by subpoena a lesser number. It is a matter of confusion as to that. This is why certain portions were not agreed to, and I therefore point out the sentence on the first page wherein we recite 228 were required or ordered to be produced into the bosom of the court. They take some issue with that.

(The Court) They say 219?

(Mr. Shimek) I believe it is 220 or 219. Other than that conclusion in the amended complaint it is

[fol. 308](Mr. Harrell) Let the record show here that we do not stipulate to that and when we respond to the complaint we will set forth our answer with particularity our position with respect to that matter.

(The Court) Is this an evidentiary matter we need to consider at this preliminary injunction? We do have questions of massive seizure.

(Mr. Harrell) Our point is simply so we can all understand what the lawsuit is about, that he sprinkled in some publications which were not subpoenaed which he claims were found not to be obscene by the United States Supreme Court and those publications came in. Now, they were not subpoenaed and so I really think for the purpose of this hearing at least that may not be material, although if it becomes an evidentiary thing I think everybody is in agreement that is that it is. Mr. Shimek, when I am speaking of he.

(The Court) Let me try this as an approach, and would this be something we are in agreement on, that pursuant to that numerous documents were subpoenaed after due notice, and that pursuant to that on that occasion something in the neighborhood of 200 publications were taken [fol. 309] into the bosom of the court without the parties making any stipulation respecting the exact ones of them that you say there is a question whether some were presented that were not included in the subpoena.

(Mr. Harrell) Yes, Mr. Shimek deliberately sprinkled in certain publications that were not delineated in the subpoena because he felt the Supreme Court already pronounced these publications not obscene and he, of course, was trying to lay a trap for the Court.

(The Court) Did the subpoena specify publications by name?

(Mr. Foster) Yes, sir. 214 by name and five others were produced and I think the transcript will reflect the circumstances under which these books and magazines were produced to the Court, and when they were produced before the Court the Court nor counsel went through — there were several boxes of them — neither the Court nor counsel at that time went through the boxes of magazines to see which were produced and which were not produced.

(Mr. Shimek) So as not to leave the Court with an erroneous interpretation here of [fol. 310] what happened, in fact the magazines were there. In fact they were represented as what was being sold, and in fact, the Court with this stipulation —

(The Court) Let me back up. I was just told the subpoena required the production of 214 or 19 by name.

(Mr. Shimek) By name.

(The Court) And those were all produced, Mr. Foster?

(Mr. Foster) The best I can determine they were all with the exception of two or three.

(The Court) And all with the exception of two or three were produced, and they were also incorporated as part of this item not listed on that subpoena, is that correct or not?

(Mr. Shimek) Yes, and Judge Fitzpatrick was so advised in the record there were some we couldn't find, but there were others we supplemented to try to get the approximate number because there were several subpoenas issued in other cases combined for the purpose of producing everything before Judge Fitzpatrick.

(The Court) If the subpoena itemized particular ones to be produced how then and why were any others presented?

[fol. 311] (Mr. Shimek) Two ways, one on the subpoenas that were issued, in fact there was a list or a named non-obscene publication already presumed by the Supreme Court.

(The Court) On what list was that?

(Mr. Shimek) On the subpoena.

(The Court) On the subpoena.

(Mr. Shimek) I know one at least on the subpoena that was presented.

(The Court) Can you all agree on that? Is there one on that subpoena list?

(Mr. Harrell) I haven't seen it. I can't agree to that. Let him call the name and give us a copy of opinion and if the

Supreme Court said that, we will agree. We will make the record speak the truth, but frankly I am in the dark.

(The Court) I did read this record this morning and there was some reference to some opinion saying something. If you can before next Thursday, perhaps you can get together, and if you can't agree we will go into this hearing and see what the three Judges say. I am not sure how material it is to be frank about it.

(Mr. Shimek) Secondly since there were [fol. 312] some missing and the prosecutor was concerned that we better have every one there and we just didn't have it, whether they were sold or something — no more than a half a dozen — we supplemented and had the approximate number correct. That is all I can say.

(The Court) Both of you are under agreement to this extent there were placed in evidence before Judge Fitzpatrick some publications kept for sale or distribution by the plaintiffs here that were not included on the subpoena list?

(Mr. Shimek) Yes.

(The Court) Everybody can stipulate to that?

(Mr. Harrell) Yes, that's correct.

(Mr. Shimek) He specifically found one obscene but that is in the record.

(The Court) That is what you are all going to try to get together on.

(Mr. Harrell) Right.

(The Court) Anything else in Paragraph 1 we need to talk about? There was an inquiry, change of ownership was

testified to by witnesses. The rest of that paragraph, there is no testimony by witnesses as to contemporary community standards, those kind of things. Would this be a way to [fol. 313] approach it, can we say that everything in Paragraph 1 of this amended complaint is stipulated as being true with the exception of, and you all point out to me the exceptions -

(Mr. Harrell) We will agree, Judge, except for this one sentence that begins "On that occasion 228 publications were ordered produced."

(The Court) Beg pardon?

(Mr. Harrell) I say we will agree to Paragraph 1 except to delete the sentence which is the next to the last line on the first page which begins, "On that occasion 228 publications."

(The Court) Everything else in that Paragraph 1 is stipulated except for that one sentence, and we covered that just a minute ago.

(Mr. Harrell) That's correct, sir.

(Mr. Shimek) Yes.

(The Court) Let's go through this thing. I notice one place where it says the police arbitrarily stripped the store. Let's go through and read a little bit. The stipulation is that they stripped the store and left it there, but it is not stipulated they did it arbitrarily.

(Mr. Foster) I don't think we stipulate the store was stripped bare. Many publications [fol. 314] offered for sale were not taken by them.

(The Court) Is that correct, Mr. Shimek?

(Mr. Shimek) Your Honor, the Sheriff's Office took everything for sale. There were some items we represented in the back were not for sale.

⊙ (The Court) They took out of the store everything that the people told them in the store was being offered for sale?

(Mr. Foster) Yes, Your Honor.

(The Court) And left some matter out that was not on the shelves and the plaintiff said were not offered for sale?

(Mr. Shimek) That's correct, everything in the store is stored to refurbish, but everything on the racks for sale was stripped clean.

(The Court) Is that correct, Mr. Foster?

(Mr. Foster) Yes, Your Honor.

(The Court) On that second page, of course, the next sentence, this was a massive seizure by the Sheriff and so forth, anything by way of conclusion in this complaint such as that would not be stipulated to, I assume, gentlemen. That's correct, is it not?

(Mr. Harrell) Yes, sir.

[fol. 315] (The Court) Going back up there among the publications on this Page 3, the paragraph that starts at the top after the second sentence, is there anything in that that is not stipulated to?

(Mr. Harrell) Beginning "none of the publications?"

(The Court) Yes. Let's read it through and see if there is anything else? It is not presently at least stipulated that 14 and 19, numbers 217 and 223 were declared to be not obscene by the United States Supreme Court?

(Mr. Shimek) I think Mr. Foster and I would stipulate. Here is a list. You read this case here, it is the U. S. Supreme Court decision.

(Mr. Foster) Your Honor, I would like to stipulate to this and if this is, in fact, what the Supreme Court has said I will stipulate to it, but these publications, they change volume and issue on them so much.

(The Court) You are not prepared to stipulate?

(Mr. Foster) I am not prepared to stipulate.

(The Court) Gigi, G-i-g-i, which is a publication not to be held obscene, are you prepared to stipulate on that?

(Mr. Foster) No, Your Honor. I am not, [fol. 316] but if the Supreme Court has said that I will.

(The Court) Let the record show these matters are not stipulated to and counsel will try before the three-judge hearing, try to see if they can stipulate on this matter. Is there anything else?

(Mr. Foster) Yes, sir, there is, and this can be cleared up right now. I don't think any of us are in position to stipulate to it because we would have to compare the list of what was seized with the list covered in Judge Fitzpatrick's order, and I think the record will speak for itself. There in the first sentence of the second paragraph on what it says, "None of the publications recited in Judge Fitzpatrick's order were located on the premises except publication recited in his order as Pinned — what does that Pinned —

(Mr. Shimek) P-i-n-n-e-d, pinned, I believe.

(Mr. Foster) Yes, sir, and I think what he is saying here, no publications covered by Judge Fitzpatrick's order were located in the store except the ones he has listed.

(The Court) Is that correct or not?

(Mr. Foster) I don't know, Your Honor, because I would have to compare Judge Fitzpatrick's [fol. 317] order with the list seized. There are 66 boxes.

(Mr. Shimek) There are thousands of publications. I have been unable to find any of the publications seized to match up with Judge Fitzpatrick's order. I don't find any except one which is the word Pinned, which is previously declared not obscene. That is what I said in —

(The Court) I am a little slow here. Judge Fitzpatrick in his order, certain matters he reviewed, I assume those were filed there because he had them before him for review.

(Mr. Shimek) Of those, yes.

(The Court) He then said that the Sheriff seized all publications offered for sale by the defendant.

(Mr. Shimek) Right.

(The Court) So, to that extent if there was a publication offered for sale his subpoena didn't mention them by name. I thought you a few minutes ago — his order mentioned them by name, but his order said seize all publications offered for sale.

(Mr. Foster) Your Honor, the subpoena does list them by number and name, and I think they are designated in the record.

[fol. 318] (Mr. Shimek) They were not. They were not introduced in the record and, in fact, Judge Fitzpatrick didn't have those subpoenas, that is the problem.

(The Court) Gentlemen, we can stay here — I assume we could stipulate and I don't understand this. I was told a few minutes ago that this subpoena listed by name and number

the publications, and I go back to read his order and it says all publications offered for sale, and I frankly don't understand this, but you are getting now to where we are making cross statements on the record when obviously the facts are there and you know them.

(Mr. Harrell) The subpoena had attached a list of publications by name.

(The Court) That were taken by the subpoena, I assume.

(Mr. Harrell) That was my understanding, if that is incorrect I am sorry.

(The Court) Judge Fitzpatrick directed that all publications for sale be seized. Now, somebody wrote a subpoena and did they use that language in the subpoena or what was done.

(Mr. Minerva) That was done pursuant to the [fol. 319] language in the order when the order was issued. I don't believe any list was attached to the order, I think that may be where the confusion is.

(The Court) Maybe it was. Did it list them by name?

(Mr. Shimek) It listed 80 publications and said seize these 80 and all like it.

(The Court) Was there a —

(Mr. Shimek) There was a subpoena ordering the plaintiffs to present to the court a list. In another case there was another subpoena to be heard, another list. There were two subpoenas.

(Mr. Johnson) Judge, there were no subpoenas on these.

(The Court) Then he made a return showing what he had seized?

(Mr. Johnson) Yes, sir, and you have a copy of those attached to that affidavit.

(The Court) And that is a copy attached to the affidavit?

(Mr. Johnson) Yes, sir.

(The Court) That is what we were talking about a few minutes ago. How did we get into this thing about there were some, he hadn't ordered seized?

[fol. 320] (Mr. Johnson) That is on the original subpoena at the time the hearing was held, they were required to produce 214 publications and the subpoena was issued at that time and instead of 214 they brought 228 up there at the hearing.

(The Court) There is something not attached as a part of this file. We have here Judge Fitzpatrick's order and you tell me this list is attached on this affidavit.

(Mr. Shimek) I think I can clear it up, Judge. Judge Fitzpatrick in his own proceeding received in evidence publications, within his own proceeding I am alleging here, that he cured whatever problem there was as to what was before him. How they got before him was subpoena. There were two separate subpoenas in two separate suits combined, and the whole thing brought before Judge Fitzpatrick in this hearing, and you have the record which recites it.

(The Court) I don't have but one suit involved before me.

(Mr. Shimek) Before Judge Fitzpatrick there were two subpoenas and two suits that were before him.

(The Court) Let's get it back to what was [fol. 321] involved in this suit.

(Mr. Shimek) It isn't, and I don't raise the question except the exception, and that should be taken care of, 228 publications.

(The Court) I am beginning to think I ought to let you have a little bit more time before I get into confusion. To me, it seems to me Jr. Johnson, these are matters you know.

(Mr. Johnson) I think I can explain to you what happened. Prior to June 26 Judge Fitzpatrick ordered or subpoenaed 214 publications to be brought before him to examine. They brought 228 and he examined those and then he entered his order on the 26th and he found in his order some 80 of those to be obscene, didn't make any ruling on the balance, but ordered the Sheriff to seize everything that was offered for sale in the store. There was no new subpoena issued at that time. The Sheriff was handed this order, the Sheriff took the order down to the store and seized everything on the shelves offered for sale and made his return, and the return listed everything he took out of the place of business. What he took out of the place of business is attached to this affidavit that this gentleman back here made.

[fol. 322] (The Court) Is that correct or not?

(Mr. Shimek) Basically, yes.

(The Court) In what respect isn't it correct?

(Mr. Shimek) The first step of subpoenas being issued and presented to Judge Fitzpatrick.

(The Court) I can't hear you.

(Mr. Shimek) The first step wherein subpoenas were issued and everything ordered to be presented before Judge Fitzpatrick is in dispute. Everything else thereafter is correct. I don't think it pertains, I don't think we can agree.

(The Court) I don't think it is material and relevant as to that small dispute, and I am going to let it ride and there again the record speaks for itself, and I don't see why there is a dispute before me, frankly.

(Mr. Harrell) Judge, if we narrow it right down to the basic stipulation plus Mr. Johnson's statement here, and then we will file an answer and this will bring it into sharp focus.

(The Court) Your answer denies, and we may have an evidentiary hearing. I was trying to get our evidence all taken now. That is my problem. Then we get back and I don't think from what we heard, I don't think we had much [fol. 323] dispute left with the exception of Mr. Johnson's statement, and we don't have anything as I see it except some minor differences, and we were going to explore it. It is all on the record, there is no factual item in dispute. It shows what is stipulated, and that Supreme Court case can't that be done?

(Mr. Harrell) That's correct.

(The Court) And I can close this down and I can set it here since you are all here and get it filed in the case, and I will get copies mailed to the Judges. As we are going through this complaint down here we say when the seizure was made by the defendant the defendant had in his possession a list of publications that Judge Fitzpatrick determined to be obscene. Is that true?

(Mr. Shimek) Your Honor, that was — we resolved this between us already, what we meant was the, t-h-e publications.

(The Court) Wait a minute, Mr. Shimek. Let me try. It says when the seizure was made by the defendant and no agent had in his possession who is the agent you are talking about, the Sheriff?

(Mr. Shimek) The Sheriff and the deputies.

[fol. 324] (The Court) What you are saying is when Sheriff Daffin made the seizure of these publications he did not at that time have a list of publications that Judge Fitzpatrick had determined to be obscene. You mean by that Judge Fitzpatrick ordered him to take out of the store all matter deemed to be obscene, and there were a few publications that Judge Fitzpatrick had determined to be obscene that might be included in the ones offered for sale, but other than that he had in his possession no list because a great many of them Judge Fitzpatrick had not determined to be obscene — is that what you are saying there?

(Mr. Shimek) It turns out to be precisely, if I can add one word to that sentence, I would reserve instead of a list of, put in the word the. That would solve it. In other words he didn't have in his possession the publications the Judge determined to be obscene.

(The Court) You want to accept that?

(All counsel signified affirmative.)

(The Court) And the statement I made about it is also correct?

(Mr. Shimek) Yes.

(The Court) Now, the rest of this is getting [fol. 325] down to the prayer of it and there is nothing to be stipulated on, isn't that correct?

(Mr. Harrell) Other than, of course, we do not wish to stipulate that the massive seizure was promoted by Judge Fitzpatrick and aided and abetted by Clinton Foster, of course.

(The Court) The last sentence there in its entirety is not stipulated, and I suppose you would question whether it is a massive seizure.

(Mr. Harrell) Correct.

(The Court) That's right, Judge Fitzpatrick and aided and abetted by Clinton Foster is not stipulated.

(Mr. Harrell) We deny that.

(The Court) And is denied. Anything else? I do want to ask you on these minor points to try to get together and give us a stipulation. One other thing, we have talked about law so much and these cases, and we have had so many matters involved that I don't know how much or to what extent any of you want to present further authority, but if you do have any memoranda you want to present on these points of course, I would be happy to have them in advance and, of course, the other Judges would. Overall I have the view [fol. 326] of it that the recent decision of the Supreme Court in the case cited to me on the motion to dissolve gives real concern, and that, of course, will not get into the merits of this at all. It will get into the question of whether the Federal Court has any right under this to intervene, and I think it has to be first determined — I don't know what Judge Simpson or Scott think, but that is what I think, and when I left it open to get some memoranda filed there was none filed with me, and it may be you want to stand or fall on that presentation, but anything you care to give us I would be happy to receive it, and if you could give us any matters in advance of hearing so that I have an opportunity to look it over I will appreciate it. If you do file anything file it in triplicate. Anything else that we need to consider at this time?

(All counsel indicated negative.)

(The Court) I will see you all in Tallahassee.

(Mr. Harrell) I do have a matter that concerns Mr. Harper or Shimek in some other matters.

(The Court) We will take it up after this hearing.

(Mr. Harrell) Right.

[fol. 327] (The Court) I have not looked over these motions but you are agreed they should go before the three-judge Court?

(Mr. Minerva) Yes, sir, Your Honor, they should be considered in connection with the three-judge hearing.

(The Court) Suppose we adjourn this hearing and thank you all for being here and I will see you in Tallahassee a week from tomorrow, and I will serve you all a notice of hearing, although you are all here.

(Mr. Harrell) Did I understand Your Honor to say we will convene at 10:00 o'clock Thursday and, of course, we convert to Eastern time.

Thank you very much gentlemen.

(Whereupon the hearing adjourned.)

[fol. 328] Certificate of Service (omitted in printing).

[fol. 329]

In the United States District Court for the
Northern District of Florida
Pensacola, Florida
Case No. PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney
of Bay County, Florida, et al., Defendants.

ANSWER—Filed July 20, 1970

COMES NOW the Defendant, M. J. "DOC" DAFFIN, as Sheriff of Bay County, Florida, by his undersigned attorney and for answer to the Amended Complaint which was allowed to be filed by this Court on the 8th day of July 1970, and subject to Motions which are pending, this Defendant says:

1. As to Paragraph 1, it is admitted that the original Complaint was filed and that on June 3rd an Amendment was filed. It is also admitted that on June 19, 1970 further proceedings were had in the Circuit Court of Bay County, Florida, before the Hon. W. L. Fitzpatrick and certain publications ordered produced and those publications along with other publications were produced. The exact nature of the proceedings before the Circuit Judge being reflected in the transcript of the record, which has now been filed in this cause and the remaining allegations of the first paragraph of Paragraph 1 being denied.

2. As to the second, an unnumbered paragraph, it is admitted that on June 25th, 1970 an Order was entered by the Circuit Court, copy of which has now been filed in this cause, which Order speaks for itself, and it is admitted that on May 12th 1970, this Court entered an Order, which Order

speaks for itself and the remaining allegations of said unnumbered Paragraph are denied.

3. As to the third, an unnumbered paragraph, it is admitted that John C. Martin, was present on the premises when the Sheriff seized the publications in accordance with the directions of the Order of June 25th from Judge Fitzpatrick. The remaining allegations of said Paragraph are denied. [fol. 330]

4. As to the next unnumbered paragraph, the allegations thereof are denied.

5. This Defendant respectfully requests a jury trial on any contempt proceedings.

Now having fully answered said Amended Complaint, this Defendant also adopts the previous Answer filed in this cause and prays that the case be dismissed at the cost of the Plaintiff.

DAVENPORT, JOHNSTON
& HARRIS

Attorneys for Defendant
M.J. "DOC" DAFFIN, as Sheriff
of Bay County, Florida

/s/Mayo C. Johnston
406 Magnolia Avenue
Panama City, Florida

Certificate of Service (omitted from printing).

[fol. 331]

In The United States District Court
For the Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney of Bay County, Florida, M.J. "DOC" Daffin, as Sheriff of Bay County, Florida, and The Honorable W.L. Fitzpatrick, as Circuit Judge of the Fourteenth Judicial Circuit in and for Bay County, Florida, Defendants.

OPINION-ORDER
Filed: July 22, 1970

Before SIMPSON, Circuit Judge, and SCOTT and ARNOW, District Judges.

BY THE COURT:

Before this statutory three-judge court (28 U.S.C. 2281, 2284) for decision upon argument and submission after due notice are plaintiff's application for preliminary injunction in accord with prior temporary restraining orders issued herein by Judge Arnow as a single judge, and motions of the several defendants to vacate or dissolve said temporary restraining orders.

Also presented are motions of the defendants to strike and to dismiss addressed to the amended or supplemental complaint.

The facts necessary to our determination are briefly stated. Not in dispute, they are drawn from the pleadings and admissions therein and from stipulations entered into by counsel before Judge Arnow on July 8, 1970.

[fol. 332] In late March 1970, the defendant Foster, in his official capacity brought suit in the Circuit Court for Bay County, Florida, under that state's general nuisance statutes, Sections 823.05 and 60.05, Florida Statutes, seeking abatement as a nuisance of plaintiff Mitchum's business "The Book Mart", 19 Harrison Avenue, Panama City, Florida. The defendant Fitzpatrick on April 6, 1970, in his official capacity as Judge of that court, granted interlocutory relief based upon the offering for sale by plaintiff of certain books determined by the state court after examination to be obscene under Section 847.011, Florida Statutes.

Review of that interlocutory order and later contempt proceedings against plaintiff thereunder is presently pending upon plaintiff's appeal before the appropriate Florida appellate court, the Florida District Court of Appeals for the First District.

After the state court had taken jurisdiction and entered its original order this suit was instituted. Judge Arnow as a single judge upon May 12, 1970 and June 5, 1970, entered temporary restraining orders directed to the state prosecuting attorney, the state circuit judge, and the executive officer of the state court, Sheriff Daffin, enjoining further proceedings in and under the state court suit. Without detailing the exact dates of entry of the competing restraining orders of Judge Arnow and the injunctive orders of the state court, it is important to note that the state court suit was brought earlier in time and that the state court had assumed jurisdiction when the instant case was commenced. [fol. 333] Judge Arnow's restraining order of May 12 was addressed to the original state court temporary injunction and his further

restraining order of June 5 was based upon and addressed to the state court contempt proceedings.

Without discussing or determining the propriety or legality of Judge Arnow's temporary restraining orders as a means of preserving the jurisdiction of this court pending presentation of the questions involved to this three-judge court, we determine that dissolution of said temporary restraining orders is required by a significant decision rendered by the Supreme Court of the United States after Judge Arnow had acted for this court. The opinion referred to came down June 8, 1970, No. 477-October Term, 1969, *Atlantic Coast Line Railroad Company*, Petitioner, v. *Brotherhood of Locomotive Engineers, et al.*, 38 L.W. 4471, U.S.

S. Ct. L. Ed. 2d . There in construing the anti-injunction statute first adopted by the Congress in 1793 and now carried forward through subsequent amendments as 28 U.S.C., Section 2283¹, the court quoted its pronouncement in *Amalgomated Clothing Workers of America et al. v. Richman Brothers Co.*, 348 U.S. 511, 75 S. Ct. 452, 99 L. Ed. 600 (1955), as follows: "This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions" and proceeded:

"Since that time Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the

¹ "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." 38 L.W. 4472, 4473.

The injunctive relief sought here as to the proceedings pending in the Florida courts does not come under any of the exceptions set forth in Section 2283. It is not expressly authorized by Act of Congress, it is not necessary in the aid of this court's jurisdiction and it is not sought in order to protect or effectuate any judgment of this court.

Dealing with the "necessary in aid of its jurisdiction" exception the Supreme Court in *Atlantic Coast Line* said further:

"First, a federal court does not have inherent power to ignore the limitations of §2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is. Cf. *Amalgamated Clothing Workers v. Richman Bros.*, supra, at 519-520. This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation. Second, if the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be 'necessary in aid of' that jurisdiction.

While this [fol. 335] language is admittedly broad, we conclude that it applies something similar to the concept of injunctions to 'protect or effectuate' judgments. Both exceptions to the general prohibition of §2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." 38 L.W. 4475

In conclusion the court in *Atlantic Coast Line* said:

"Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion." 38 L.W. 4475.

The clear applicability of *Atlantic Coast Line* to the facts here present makes unnecessary any further discussion by us of the principles involved in the interplay between state and federal jurisdictions. The temporary restraining orders are due to be dissolved, and the application for preliminary injunction must be denied. For like reasons no permanent injunctive relief is warranted. No amount of tortured reasoning by us will suffice to force the factual situation in this case as outlined above into fitting any of the statutory exceptions to the anti-injunction mandates of Title 28, U.S.C., Section 2283. Injunctive relief, either preliminary or permanent, is not available on these facts.

The court at the hearing on this matter in Tallahassee on July 16, 1970, heard argument on the motions to dismiss the amended or supplemental complaint. The motions to dismiss were hurriedly filed and briefed in order to be [fol. 336] considered at the July 16 hearing. Similar haste is not

required in ruling upon them but we are constrained to provide a prompt and appealable ruling consonant with our views as to the availability of injunctive relief. This order will accomplish that end.

We do not contemplate requiring further argument (although we do not foreclose it) as to the motions to dismiss, but inasmuch as the complaint seeks declaratory as well as injunctive relief we consider it appropriate, before reaching a decision as to dismissal of the complaint, to call upon counsel for additional briefs in this respect. The briefs should cover the questions raised by the motions to dismiss, the complaint's prayer for declaratory relief, the applicability of the doctrine of abstention by this court during pendency of the state proceedings, and related and dependent questions. We do not foresee the necessity for reply briefs.

In consideration of the foregoing, it is

ORDERED:

1. Plaintiff's application for preliminary injunction is denied, and all further injunctive relief, preliminary or permanent, sought by the amended or supplemental complaint, is likewise denied. In this respect this order is intended to be final for all purposes, including appeal.

2. The defendants' motions to vacate or dissolve the temporary restraining orders herein of May 12, 1970 and June 5, 1970 are each granted and said temporary restraining orders are each vacated and dissolved. [fol. 337]

3. The motion to strike from the amended or supplemental complaint reference to the defendant M. J. "Doc" Daffin "individually" is granted. *Sua sponte*, the court strikes any reference to actions of the defendants Foster and Fitzpatrick as individuals. The defendant Daffin's motion to strike paragraph 4 of the complaint is not passed upon since

it is rendered moot by dissolution of the temporary restraining orders and by final refusal of any injunctive relief.

4: Ruling upon the motions to dismiss the amended or supplemental complaint interposed by the several defendants is deferred for further consideration by the court. In this connection the respective parties are directed to file and serve contemporaneous briefs on or before August 15, 1970. Four copies shall be filed with the Clerk, one for the court file and one for use of each of the three judges of this court.

Done and Ordered this 22nd day of July, 1970.

/s/Bryan Simpson
United States Circuit Judge

/s/Charles R. Scott
United States District Judge.

/s/Winston E. Arnow
United States District Judge

[fol. 338] ARNOW, concurring:

Under *Atlantic Coast Line*, and its command, it is appropriate this Court now determine no permanent injunctive relief against the pending state court action is warranted. But there is not foreclosed by this order the possibility of injunctive relief against future enforcement of either or both of the state statutes here involved by the defendant state officers, in the event this Court does not dismiss, but proceeds to give declaratory relief, with such resulting in holding of unconstitutionality of one or both of these statutes.

[fol. 339]

In the United States District Court for the
Northern District of Florida
Pensacola Division
Case No. PCA 2224

Robert Mitchum d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, M.J. "DOC" DAFFIN, as Sheriff of
Bay County, Florida, and The Honorable W. L.
Fitzpatrick, as Circuit Judge of the Fourteenth
Judicial Circuit in and for Bay County, Florida,
Defendants.

**MOTION FOR PRE-TRIAL CONFERENCE
AND FINAL HEARING**
Filed July 23, 1970

COMES NOW the Plaintiff, by his undersigned attorney,
announcing that all briefs by the Plaintiff will be filed on
Wednesday, July 29, 1970. Plaintiff prays that this Court will
schedule this matter for pre-trial conference and final hearing
in light of the three-judge court's decision in case number
69-678-Civ-J, United States District Court, Middle District of
Florida, Jacksonville Division.

Certificate of Service (omitted in printing).

[fol. 340]

In the United States District Court for the
Northern District of Florida
Pensacola Division
Case No. PCA 2224

Robert Mitchum d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, M.J. "Doc" Daffin, as Sheriff of Bay
County, Florida, and The Honorable W. L.
Fitzpatrick, as Circuit Judge of the Fourteenth
Judicial Circuit in and for Bay County, Florida,
Defendants.

**PLAINTIFF'S BRIEF ON THE CONSTITUTIONALITY OF
§ 847.011, 823.05 and 60.05—Filed July 29, 1970**

§847.011 IS UNCONSTITUTIONAL BECAUSE IT IS A
BLANKET PROHIBITION OF THE DISSEMINATION OF
MATERIAL; IT IS NOT CONFINED TO THE REGULATION
OF THE LEGITIMATE STATE INTERESTS OF
JUVENILES, PANDERING OR PRIVACY; IT MAKES MERE
POSSESSION OF EROTIC MATERIAL A CRIME; THE
STATUTE ONLY PARTIALLY DEFINES WHAT IS
OBSCENE AND REASONABLE MEN CANNOT
ASCERTAIN THE NATURE OF THE ACT THE STATUTE
PROHIBITS; IT CONTAINS AN UNCONSTITUTIONAL
PRESUMPTION IN PARAGRAPH (1) (b); AND IT UNDULY
RESTRICTS AN INDIVIDUALS RIGHT TO READ AND
OBSERVE WHAT HE PLEASURES WITH THE CONSEQUENT
SUPPRESSION OF FREEDOM OF THOUGHT.

The United States Supreme Court as recited above has on
many, many occasions cited *Redrup v. New York*, 386 U.S.

767 (1967), to reverse convictions and determinations of obscenity. It would do well to review the Supreme Court cases prior to *Redrup*, supra, and those between *Redrup* and *Stanley v. Georgia*, 394 U.S. 557 (1969), to analyze what the U.S. Supreme Court has been trying to tell the lower courts and the state legislatures about the regulation of expression. Three cases, need to be considered; *Roth v. U.S.A.*, 354 U.S. 476 (1957), which precedes *Redrup* and *Stanley* which succeeds it.

It is also necessary to examine the evolution of the [fol. 341] First Amendment obscenity approach is pre-*Redrup* discussion it is fair to say that the court has always recognized a basic limit on First Amendment freedoms where the speech in question created a risk of causing a harm that the government had a right to prevent. If there was a clear and present danger that harm would result from the exercise of the speech then that First Amendment freedom could be curtailed. See *Schenck v. United States*, 249 U.S. 47, 52 (1919). The crux of the clear and present danger approach was whether the gravity of the evil discounted by its improbability, justified invasion of free speech as was necessary to avoid the danger. See *Dennis v. United States*, 341 U.S. 494, 510 (1951). Some evidence of some effort to instigate action was required before any speech could be considered so dangerous that its regulation would be justified. See *Yates v. United States*, 354 U.S. 298, 318 (1957).

The court has also used another approach to determine whether regulation of speech was valid and that has been the balancing of the social interest approach. The idea is to balance the social interest served by the state's regulation against the loss of the freedom of First Amendment privileges that the regulation would bring about. See *American Communications Association v. Douds*, 339 U.S. 382, (1950), *Dennis*, supra, Page 524, *Barenblatt v. United States*, 360 U.S. 109, 126 (1959). The balancing approach requires an analysis of cause and effect between the speech and the evil purported

to be threatened by that speech. The probability of harm which would be required before speech could be regulated can vary with the nature of the interest that is threatened by the harm, the value of the speech itself, and the nature of the restriction. Sometimes the court would use the balancing approach particularly in the bar admission cases and other times the court would use the clear and present danger approach, particularly in the contempt of court situations. See *Wood v. Georgia*, 370 U.S. 375 (1962).

It has only been within the last 15 years that the Supreme Court has ever listened to a challenge to the constitutionality of laws suppressing obscene material. They had a chance [fol. 342] in 1948 in *Doubleday and Co. v. New York*, 335 U.S. 848, but because Mr. Justice Frankfurter was a personal friend of the defendant and couldn't hear the case, and because the remaining eight justices were divided four to four, the Court affirmed the lower court's conviction without an opinion. In 1956, the court decided its first important obscenity case. It was the test of a Michigan statute that made it a crime to "publish materials tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth . . ." The Court unanimously held that the Statute was unconstitutional because it curtailed the freedom of adults while attempting to protect children. The legislation was not reasonably restricted to the evil with which it was supposed to deal. In short, it reduced the adult population of Michigan to reading only what was fit for children. A state cannot justify regulation of material merely because it might be harmful if circulated to children. See *Butler v. Michigan*, 352, U.S. 280.

The next year in 1957, the court decided *Roth*, supra. The parties stipulated that the material was obscene and the First Amendment was met head on. Roth's argument was that the prosecution in an obscenity case must show that there was a probability that the material would bring about a substantive evil (criminal or antisocial conduct) which the government had the power to prevent. This was a clear and

present danger approach. The United States and the State of California argued the balancing of social interest approach and the weighing of those basic factors, namely, the value and the kind of speech involved, the public interest that was served by the restriction, and the extent of the restriction that is imposed.

The court apparently rejected both approaches and expressed the view that certain speech is unworthy of First Amendment protection and that no balancing of harm or showing of clear and present danger was required to justify regulation of obscenity since it was utterly worthless. The court then divided the expression into protected/unprotected speech, commonly known as and hereinafter referred to as p/u speech or the p/u [fol. 343] approach. The court very adroitly avoided the issue as it is so capable of doing by drawing an analogy from and plucking a phrase out of *Beauharnais v. Illinois*, 343 U.S. 250 (1952). In that phrase they inserted the word "obscenity" in lieu of "libelous utterances". The phrase in *Beauharnais*, supra, was "Libelous utterances are not within the area of constitutionally protected speech." The phrase in *Roth*, supra, reads "Obscenity is not within the area of constitutionally protected speech or press". The court reasoned that since libel and blasphemy laws were in existence when the First Amendment was adopted then it must be that the First Amendment was not intended to protect every utterance, and besides that the court had always presumed that obscenity was not protected by the freedoms of speech and press. *Roth*, page 481.

Under the p/u approach it appears that government regulation is automatically valid if you can label it "obscene". All you have to have in that situation is a definition of what is obscene. The *Roth* definition, upon which the Florida Statute is based is "Material is obscene if to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to

prurient interests." It is at that point that the Florida legislature having adopted that definition stopped thinking and ceased reviewing the law; that is the test still recited in Florida Statute 847.011. Of course, this test is now meaningless as will be demonstrated in the next page or so.

The lower courts couldn't really tell what sort of material the court had in mind and so the court in time added other requirements to the prurient interest definition recited in *Roth*. In *Manuel Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), the court reversed a finding that three magazines featuring photos of male models in nude poses were obscene because the magazines lacked the "patent offensiveness" which was required along with prurient interest before the material could be denied the protection of the First Amendment. Subsequently in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), where the court reversed a Massachusetts finding that Fanny Hill was obscene, they recited a third requirement, [fol. 344] namely; the material being "utterly without redeeming social value". It is this tripartite test of material possessing prurient appeal, patent offensiveness, and being utterly without redeeming social value that carried down to *Redrup*, at which point three other elements were tossed into the pot of the confusion. The confusion in *Redrup* came about because the court had in the meantime overruled *Beauharnais*, supra, in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964). *Sullivan*, supra, involved a discussion of the law concerning libel of public officials. The *Sullivan* court faced and rejected the claim that libel was not constitutionally protected. The court said that labels can't dispose of constitutional issues, that libel could claim no immunity from constitutional limitations, and that libel must be measured by standards that satisfy the First Amendment. The *Redrup* court mentally plugged in the word obscenity for libel and discussed and expressed that idea in the first portion of its opinion in the *Redrup* case.

Redrup was the first time in the line of obscenity cases since *Roth* that the court failed to mention *Roth*. The court did mention the tripartite test of prurient appeal, patent offensiveness, and redeeming value guideline. But it also discussed the state's interest in juveniles, in pandering and in privacy. It appears then that *Redrup* had six points in mind instead of three upon which future obscenity findings should be based. In the alternative, at least it was a transitioning from the tripartite test of prurency, offensiveness and value to the governmental interests in juveniles, privacy and pandering. The *Redrup* court said as follows on page 769,

"In none of these cases was there a claim that the statute in question reflected a specific and limited concern for juveniles. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. And in none was there evidence of the sort of 'pandering' which the court found significant in *Ginzberg v. United States*."

This Three Judge Federal Court is aware of the numerous cases in which the U. S. Supreme Court has summarily disposed of cases by reciting *Redrup*. Citing *Redrup* avoids a difficult [fol. 345] recurring, and unpleasant task. It is an easy way to express the court's unhappiness with the tedious review of cases involving salacious material occasioned by the failure of the lower courts to limit properly the censorship of material dealing with sex. The Court will continue to use *Redrup* to encourage lower courts to step out and take charge as their oaths require them to do.

Last year the court decided *Stanley*, supra, which was its first discussion of obscenity prohibition where public dissemination of salacious material was not involved. The court in *Stanley* could have acquiesced in *Roth*'s blanket denial of First Amendment protection and placed its approval

upon the p/u approach and explained that special circumstances involved in the prohibition of mere possession, under the Fourt or Ninth Amendments would make such a prohibition unconstitutional, but they didn't do that. They paid some lip service to *Roth* by saying

"It is true that *Roth* does declare, seemingly without qualification, that obscenity is not protected by the First Amendment".

They then noted that *Roth* involved extensive public distribution of obscene material and that all the cases that had been before them since *Roth* dealt with the power of the state to regulate certain public actions taken or intended to be taken with respect to obscene matter. The court said

"None of the statements cited by the court in *Roth* for the proposition that 'this court has always assumed that obscenity is not protected by the freedoms of speech and press' were made in the contest of mere private possession..."

It appears that the Court is limiting the logic of *Roth* to public distribution circumstances but if that is the case then the entire sense of the holding with regard to the protection of the First Amendment vanishes. The court held that uncirculated obscene matter is protected while circulated material may be prohibited. Obviously the material may be protected or unprotected depending upon the circumstances of its use. Therefore some quality inherently in the material itself cannot determine whether or not it will be suppressed. It isn't then the obscenity of an entity that removes it from the protection of the First Amendment but it [fol. 346] is some aspect of the distribution which divests obscene matter of First Amendment protection. The *Stanley* court clearly held that the p/u approach has been abandoned by finding that First Amendment protection for obscenity possession was an open issue. The p/u approach of *Roth* that something obscene could have no protection, had to be rejected. A mere

label is no longer sufficient to justify regulation. At this point the Fourth element of either of the problems of juveniles, privacy or pandering mentioned in *Redrup* becomes significant. In order for the State of Florida to be permitted to regulate obscenity, its statutes must provide for and its prosecutors must prove prurient interest, patent offensiveness, no redeeming value and demonstrate a legitimate state interest in namely; the juvenile or privacy or pandering interest.

The court critically evaluated the interests advanced by the State of Georgia which were supposed to justify the existence of its statute. Why discuss the interest of the state if a label of obscenity will suffice? The court said as follows

"*Roth* and its progeny certainly do mean that the First and Fourteen Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither *Roth* nor any other decision of this Court reaches that far. As the Court said in *Roth* itself, '[c]easeless vigilance is the watchword to prevent...erosion [of First Amendment rights] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.' 354 U.S. at 488. *Roth* and the cases following it discerned such an 'important interest' in the regulation of commercial distribution of obscene material. That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material."

It is now obvious in obscenity cases that mere labels cannot dispose of constitutional issues. It is now clear that as *Sullivan* overturned *Beauharnais* by saying libel can claim no talismanic immunity from constitutional limitations, so *Sullivan* overturns *Roth* on this point and says, in effect, that

obscenity can claim no talismanic immunity from constitutional limitations. *Roth's* statement that obscenity is not protected by the First [fol. 347] Amendment now is read to mean that in previous obscenity distribution cases the Court has usually found government invasion of freedom of speech justified in view of the more important societal interest in preventing widespread distribution of salacious material. Erotic material is part of the body of protected expression behind the First Amendment's door. That door cannot be opened unless there is demonstrated a more important interest which would permit speech to be constitutionally restricted. The exact method of weighing and evaluating the governmental interests to determine whether they are more important than free speech rights is discussed later in the *Stanley* opinion.

Since *Stanley* and *Roth* should be considered consistent with each other as much as is possible, then it can be so only if both are trying to outline and pinpoint the same guideline for the lower courts. The p/u approach in *Roth* required to court to communicate its guidelines to lower courts by a detailed definition of an unprotected category of expression. *Roth* wanted to convey the idea to the lower courts that material cannot be regulated unless it manifests an evil or the material is so bad that it may lead to harm. This standard was difficult to express since the foundation of the p/u approach is worthlessness not harmfulness. The continuous adding to *Roth* of definitions, of new standards, and of *Redrup* reversals, demonstrates the court's attempt under the p/u approach to convey the idea that in order for the denial of First Amendment protection to be constitutional the material had to be harmful in some sense to some interest. This is why finally it was necessary for the court to speak out in *Stanley* as it did. For the first time the Court has explained what value it sees in the regulation of obscenity and it explains what rights are jeopardized by such censorship.

The court concluded that regulation of speech is only permissible where it is required in order to serve a more

important interest. It was now on more comfortable, traditional First Amendment soil and could then accept or reject the interest advanced by the state on which Georgia Bottomed it's right to regulate.

[fol. 348] The first harm which Georgia attributed to obscenity was the corruption of the minds of those exposed to such material. To this the Court said,

“Georgia asserts the right to protect the individual’s mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person’s thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. . . . Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. . . . And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing. . . . Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”

Having thus totally rejected the most basic “interest” asserted by Georgia, the Court proceeded to the second harm alleged by the State to justify obscenity regulation. Georgia argued that exposure to obscenity may lead to deviant sexual behavior or violent crimes. The court replied.

“There appears to be little empirical basis for that assertion. But more importantly, if the State is only concerned about printed or filmed materials inducing anti-social conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that [a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law. . . .” *Whitney v. California*, 274 U.S. 357, 378

(1927) (Brandeis, J., concurring). . . Given the present state of knowledge, the State may no more prohibit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."

The final argument advanced by Georgia was that the evidentiary difficulty encountered in proving intent to distribute such matter made it necessary to establish a crime of mere possession to guarantee that distributors could be stopped. The Court responded in two sentences,

"We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restrictions may not be justified by the need to ease the administration of otherwise valid criminal laws.

The Court's discussion and eventual rejection of the proffered state interests was paralleled by its discussion of the [constitutional rights that are jeopardized by obscenity regulation. The Court appears to distinguish at least three such interests which must be considered: freedom of thought, the right of access to ideas and information, and the right to privacy.

In regard to the issue of freedom of thought, it seems clear that a denial of the right to own certain classes of printed or filmed materials is an attempt to limit the direction of an individual's thoughts. In the Court's view, "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

Closely related to freedom of thought is the individual's interest in having free access to ideas and information, an interest which the Court repeatedly characterized as a right.

"It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive.' . . . This right to receive information and ideas, regardless of their social worth. . . is fundamental to our free society."

Supplementing the preceding two interests and adding weight of its own, is the right to privacy. The Court quoted the famous paragraph from Mr. Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) and cited *Griswold v. Connecticut*, 381 U.S. 479 (1965), the 1964 case in which the Court held that the right to a zone of marital privacy prohibited the state from outlawing oral contraceptive pills. The broad language employed in this portion of the *Stanley* opinion assures protection under the right to privacy for "the right to satisfy [one's] intellectual and emotional needs in the privacy of etc. . . ." The Court concluded on this issue: "Whatever may be the justification for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."

Since obscene speech is now within the scope of the First Amendment, the Court must constantly check on the preservation of free speech values and this will require the Court to evaluate the interests supporting the regulation of commercial distribution of obscene matter. Five basic interests might conceivably justify [fol. 350] restriction on dissemination of salacious material, namely; (a) prevention of crimes of sexual violence, (b) protection of adults from moral depravity and corruption, (c) preservation of the moral and legal fabric of our society, (d) prevention of exposure of children to such material, (e) prevention of obtrusive, publicly offensive displays of obscene matter.

The Court clearly rejected (a) in *Stanley*. The Court denies that such exposure to obscene material causes sex crimes and goes on to say that even if such a casual relationship could be demonstrated, then and in that event

only the resulting criminal acts ought to be the object of legal prohibition.

The Court also rejected (b) and (c). These interests appear dangerously vague when suggested as a basis for restricting freedom of speech. The Court accepts (d) and (e) as valid governmental interests. Since overbreadth is fatal to legislation in the first amendment area, then only statutes carefully drafted, to protect children and to prevent affronts to the public can withstand today's constitutional test. General public distribution, in the case of *The Panama City Book Mart* means commercial sales of publications and does not involve the display of obscenity in such a manner that the public cannot avoid seeing it, and being offended by it, nor does it involve sales to minors. Therefore in this case, the statute is unconstitutional as it is applied. In order to have it applied correctly it must recite its own limitations, and is therefore unconstitutional on its face.

To coin a statement, the State of Florida has no business telling a man what books or publications he may read. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Accordingly, the State of Florida has no legitimate interest in the suppression of allegedly obscene materials unless [fol. 351] the statute is narrowly drawn to prevent the exposure of children to such material, and to prevent obtrusive public offensive displays of obscene material, i.e., pandering or invasion of privacy.

Section 847.011 is unconstitutional because it authorizes seizure of matter conceived by the State to be obscene before a prior judicially supervised adversary hearing is held on the question of obscenity. See *Meyer v. Austin*, No. 69-678-CIV-J, U.S.D.C., Middle District of Florida, July 22, 1970.

Judge Fitzpatrick's April 6, 1970 order involved 25 magazines of which 6 were found to be obscene, while the

other 19 though not declared to be obscene were retained by the Court. Based upon the finding of obscenity of 6 magazines the court authorized a seizure of all materials in the store by closing down the same; the court conceiving that all material contained therein was obscene even though there had been no prior, judicially supervised, adversary hearing concerning the thousands of publications that were located in the store. Judge Fitzpatrick's June 25, 1970 order declaring 80 publications obscene but retaining the remaining 148 without a determination of obscenity, authorized a seizure of all material because the Court conceived that the material on the premises was obscene even though there had not been a prior, judicially supervised, adversary hearing on the question of obscenity. In fact none of the publications declared obscene were among the thousands of publications seized.

Section 847.011 is unconstitutional because as authoritatively interpreted by Florida courts it prescribes an inappropriate local standard for the identification of obscenity. See *Meyer v. Austin*, supra.

The transcripts of the April 3 hearing and the June 19 hearings clearly show that there was no testimony concerning contemporary community standards in general, nor specifically a local standard, a state standard, nor the required national standard. If any standards at all were imposed, it is clear from whence they came, namely; from Judge Fitzpatrick and in that case probably [fol. 352] local standards. There is no doubt that the First District Court of Appeal will also apply the standards of Panama City just as they applied the standards of the City of Pensacola in *Felton v. City of Pensacola*, 200 So.2d 842, 848 (1967).

Section 847.011 is unconstitutional because neither it nor any other Florida Statute, rule or practice, assures a prompt final judicial determination of obscenity on appeal.

Judge Fitzpatrick's order was entered on April 6, 1970. On April 7, 1970, an appeal was taken to the First District

Court on Appeal (Florida). Briefs were filed within a two week period and all argument was heard by that State appellate on June 3, 1970. Some 60 days will soon have passed and there is no decision coming down from the First District Court of Appeal. They did, however, deny a motion to stay Judge Fitzpatrick's order pending question on appeal. Clearly 847.011 (7) (b) (c), which provides for an expeditious trial procedure, makes no provision for an expedited appellate procedure. One must consider the fact that except for federal court intervention almost four months will have passed since the initial determination of obscenity and no decision has been rendered by the First District Court of Appeals who is known for waiting eight (8) to fifteen (15) months before handing down a decision on this subject. See *Meyer v. Austin*, supra.

Florida Statute 847.011 is unconstitutionally vague in that it forbids or requires the doing of an act in terms so vague, fluid, and indefinite that men of common intelligence must necessarily guess at its meaning and differentiate as to the application thereof. Provisions of the Statute are susceptible of sweeping and improper application by a law enforcement officials and judges and has a chilling and inhibiting effect on the exercise of the Federal constitutional rights of the citizens of Florida. In light of the approximate 35 reversals by the U.S. Supreme Court citing *Redrup*, it is clear that under the Florida Statute no person can tell with any degree of certainty what act is criminal as far as the distribution of presumptively protected material is concerned. The Statute is also void for impermissible overbreadth [fol: 353] in that there is no scienter requirement requiring that the party sought to be held criminally accountable have knowledge of the fact and character of the obscenity of the material charged. Also the statute creates an unconstitutional presumption in Sub-Section (1) (b) that "the knowing possession by any person of six or more identical or similar materials...coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said

paragraph." This presumption can be applied to private possession as well as to commercial possession and the statute fails to distinguish between constitutionally protected personal possession and public possession of materials alleged to be obscene. It even makes private possession a crime contrary to *Stanley v. Georgia*, supra.

This Court should go further than *Meyer v. Austin* and not only declare the statute unconstitutional for the three reasons cited therein but in addition thereto for the reason that it is overbroad because of the following combination of factors;

(a) The activity sought to be suppressed is totally within the concern of the First Amendment since it is oriented to the communications of ideas,

(b) The State of Florida can demonstrate no degree of harm to any valid governmental or social interest caused or threatened by the exercise of the First Amendment rights demonstrated herein,

(c) The interference by the State of Florida is totally restrictive and punitive,

(d) There is no legitimate state interest or policy which justifies such interference and

(e) The policy of the State of Florida in the total suppression of allegedly obscene material is so closely intertwined and connected with the actual application of the statute that the lower courts are immune to any supervision by the appellate courts who merely rubberstamp their decisions on this subject.

[fol. 354] THE STATE MAY NOT DECLARE THE DISSEMINATION OF PRESUMPTIVELY PROTECTED FIRST AMENDMENT MATERIAL TO BE A NUISANCE,

AND THE ABATEMENT OF AN ALLEGED NUISANCE UNDER SECTION 823.05 IN CONJUNCTION WITH SECTION 60.05, FLORIDA STATUTES, IS NOT A SUFFICIENT JUSTIFICATION FOR PRIOR RESTRAINT OR CHILLING EFFECT OF AND UPON FIRST AMENDMENT FREEDOMS.

Nuisance prevention legislation is historically founded upon the thesis that one may use his property in any manner he deems fitting to the limitation that this use shall not infringe upon his neighbor's use of property adjacent thereto or upon the health, safety, comfort, or morals of the community. To constitute a nuisance, the act, structure, or device complained about must cause some injury, real and not fanciful, *Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Commission*, 216 N.E. 2d 788, and a nuisance must affect either the comfort morals or health of the public to fall within statutory classification, *Sparks v. City of Pella*, 137 N.W.2d 909 (Iowa).

A nuisance may be either private or public, *Bishop Processing Co. v. Davis*, 132 A.2d 445 (Md). For the condition to be a public nuisance it must produce a common injury and constitute an obstruction to public rights, *Mandel v. Pivnick*, 125 A.2d 175 (Conn); and may be proscribed if the activity be harmful to the public health, create an interference with a way of travel or the peaceful use of public land and streets, *Garfield v. Young*, 82 N.W.2d 876 (Mich).

Similarly, nuisances have been found to exist in the unreasonable, unwarrantable or unlawful use by a person of his property, real or personal, and the producing of such material annoyance, inconvenience, discomfort or hurt thereby that the law may abate it, *Commonwealth v. Baird*, 21 Erie 200 (Penna); *Chaslin v. Glick*, 177 N.E. 2d 293 (Ohio); *State ex Rel Vobe v. Hill*, 167 A.2d 738 (Del); *Westwood Development Co. v. Esponge*, 342 S.W.2d 623 (Tex); and *Harting v. Milwaukee County*, 86 N.W.2d 475 (Wis).

The various legislatures are empowered and have great [fol. 355] latitude in regulating activities that effect the community as a whole. The contrary is true, however, when such regulations infringe upon the freedoms guaranteed by virtue of the First Amendment made applicable to the states under the Fourteenth Amendment. The Supreme Court of Texas in *State v. Spartan's Industries, Inc.*, 447 S.W.2d 407, stated the following of the state's police power in regulating purported nuisances:

"It is true that the Legislature may not validly declare something to be a nuisance which is not so in fact, but that depends upon the question of whether that which is declared to be a nuisance endangers the public health, public safety, public welfare, or offends the public morals."

In the freedoms of speech and press the protected words include not only books and newspapers but magazines, films, pamphlets, and leaflets. It not only protects the creation but the publishing and circulation. The Supreme Court of the United States in *Lovell v. Griffin*, 303 U.S. 444, stated:

"The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager.

"We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license

and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish 'without a license what formerly could be published only with one.'

"The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.

"The ordinance cannot be saved because it relates to distribution and not to publication, *"Liberty of circulating is as essential to that freedom as [fol. 356] liberty of publishing; indeed, without the circulation, the publication would be of little value."* Ex parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877, 879. The license tax in *Grosjean v. American Press Co.*, 297 U.S. 233, 80 L.ed. 660, 56 S.Ct. 444, *supra*, was held invalid because of its direct tendency to restrict circulation." (Emphasis supplied).

The Supreme Court has held that this freedom of speech and press is a fundamental right and legislative preference in selection of modes in combating purported evils is insufficient justification for imposition of unconstitutional "prior restraint." It is not occasional abuse of censorial power that is prohibited but the threat inherent in censorship of any nature that creates the danger to these freedoms. The Court in *Thornhill v. Alabama*, 310 U.S. 88, states:

"First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.

"Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.

"Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weight the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations.

"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.

[fol. 357]

"A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself

to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.

"It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society.

"But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

The State of Alabama in that case argued that the purpose of the legislation limiting freedom of discussion was to protect the community from violence and breach of the peace arising out of picketing. The Supreme Court rejected this contention as there was no clear and present danger of destruction of life or property or of a breach of the peace.

The United States Supreme Court as early as 1931 was confronted with a state limitation on First Amendment freedoms utilizing the concept that the exercise of those rights constituted a nuisance in the type and manner of

speech and the type and manner of its dissemination. There the District Court of Hennepin County, Minnesota adjudged a publication disseminated by "Near" to be a nuisance in that it was a "malicious, scandalous and defamatory newspaper" and thereafter enjoined further like publications. The Supreme Court of Minnesota affirmed on appeal the lower court judgment. The Supreme Court of the United States reversed and held as unconstitutional the portions of the statute permitting the [fol. 358] restraint upon First Amendment freedoms by declaring such activity a nuisance and permitting injunctions against future publications and dissemination. The Court here in *Near v. Minnesota*, 283 U.S. 697, stated the following of the statute and the Court's reasoning:

"Section 1: Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away,

"(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

"(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,

"is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

"Section two provides that whenever any such nuisance is committed or exists, the county attorney of any county where any such periodical is published or circulated, or in case of his failure or refusal to proceed upon written request in good faith of a reputable citizen, the attorney general or upon like failure or refusal of the latter, any citizen of the county, may maintain an action in the district court of the county in the name of the state to enjoin

perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it.

....

"At the beginning of the action on November 22, 1927, and upon the verified complaint, an order was made directing the defendants to show cause why a temporary injunction to publish, circulate or have in their possession any editions of the periodical from September 27, 1927, to November 19, 1927, inclusive, and from publishing, circulating, or having in their possession, any future editions of said The Saturday Press' and 'any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise."

....

"The court further found that the defendants through these publications 'did engage in the business' of regularly and customarily producing, publishing, and circulating a malicious, scandalous, and defamatory newspaper,' and 'the said publication' 'under said name of The Saturday Press, or any other name, constitutes a 'public nuisance under the laws of the state.' Judgment was thereupon entered adjudging that 'the newspaper, magazine and periodical known as The Saturday Press, as a public nuisance, be and is hereby abated.' The judgment perpetually enjoined the defendants 'from producing, editing, publishing, circulating, having in their possession, [fol. 359] selling or giving away any publication whatsoever which is malicious, scandalous or defamatory newspaper, as defined by law,' and also 'from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title.'

"This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the 14th amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of persons and property.

"Liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the history conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

"This suppression is accomplished by enjoining publication and that restraint is the object and effect of the statute.

"The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.

"Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he published what is improper, mischievous or illegal, he must take the consequence of his own temerity."

The Court then quoted with approval from *Patterson v. Colorado*, 250 U.S. 454:

"In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practised by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."

and thereafter stated:

"In the present case, we have no occasion to inquire as [fol. 360] to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

"Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint.

"The fact that the public officers named in this case, and those associated with the charges of official

derelection, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication."

Under the reasoning set forth by the United States Supreme Court over three decades ago it is patently true that a state may not declare the dissemination of First Amendment materials to be a nuisance. Similarly these freedoms may not constitutionally be enjoined.

Since *Near v. Minnesota*, supra, courts have been called upon numerous times to delineate the power of the legislatures to enact legislation limiting First Amendment freedoms. The United States Supreme Court in *Buller v. Michigan*, 352 U.S. 380 (1957), reversed a state court conviction and held the Michigan statute as unconstitutional in limiting the exercise of these freedoms and of the right of the public to receive them, stated:

"The State insists that, by thus guarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile-innocence it is exercising its power to promote the general welfare.

"We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society."

These courts have placed the bounds on the restrictions at the point where the exercise of these freedoms would constitute a [fol. 361] clear and present danger to society and government, *American Communications Assoc. C.I.O. v. Douds*, 339 U.S. 382; *Schenk v. U.S.*, (249 U.S. 47; and *Bridges v. California*, 314 U.S. 252.

The County of Los Angeles attempted to preclude the dissemination of crime "comic books" to persons under 18 years of age but the statute was found to be unconstitutional for not adhering to the necessity of a clear and present danger, *Katzer v. County of Los Angeles*, 341 P.2d 310.

The United States Supreme Court again in *Cantwell v. Connecticut*, 310 U.S. 305, delineated some of the limitations upon state restrictions of First Amendment freedoms and stated:

"The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment.

"Thus the Amendment embraces two concepts,—Freedom to believe and freedom to act. The First is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

"Conviction on the fifth count was not pursuant to a statute evincing a legislative judgment that street discussion of religious affairs, because of its tendency to provoke disorder, should be regulated, or a judgment that the playing of a phonograph on the

streets should in the interest of comfort or privacy be limited or prevented. Violation of an Act exhibiting such a legislative judgment and marrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature.

"No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. *Equally obvious is it that a state may not unduly suppress free communi-[fol.362]cation of views, religious or other, under the guise of conserving desirable conditions.*" (Emphasis supplied).

In that case Cantwell had been convicted of the crimes of soliciting without a license and Breach of the Peace for extolling the view that all religions and in particular Catholicism was bad. The United States Supreme Court reversed those convictions.

The United States District Court for the Southern District of New York in *Konigsberg v. Time, Inc.*, 288 F. Supp. 989 (1968) had before it a matter where an injunction was sought to prevent the publication of magazine articles. Judge Pollock denied the injunction as such a request was repugnant to the principles of the First Amendment and the courts of equity and stated:

"Plaintiff seeks to enjoin defendant from publishing magazine articles which allegedly libel the plaintiff and the August 9, 1968 issue of Life Magazine in particular, which contains an article entitled 'The Mob: The Congressman and the Hoodlum' and which contains statements regarding the plaintiff which, if false, would constitute libel.

"A court of equity will not, except in special circumstances, issue an injunctive order restraining libel or slander or otherwise restricting free speech,

"To enjoin any publication, no matter how libelous, would be repugnant to the First Amendment to the Constitution, Crosby v. Bradstreet Co., 312 F.2d 483, (2d Cir. 1963); Parker v. Columbia Broadcasting System, Inc., 320 F.2d 937 (2d Cir. 1963); cf. Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L. ed. 1357 (1931), and to historic principles of equity. American Malting Co. v. Keitel, 209 F. 353 (C.C.A. 2, 1913).

"The motion for an injunction is therefore denied."
(Emphasis supplied).

An appellate court of New Jersey recently had a matter involving the proscription of a film before it in that the film was deemed by the officials as obscene and proscribable. The court therein *Lordi v. V.A. New Jersey Theaters, Inc.*, 259 A.2d 734, stated the tests in determining a particular work as obscene and then held that this criteria must be met regardless whether the proscription was criminal or civil. In dealing with proscription the court noted the difference between material disseminated to adults verses that disseminated to children but precluded the [fol. 363] complete suppression of a work and stated:

"While the State has no interest in and may prevent the dissemination of material deemed harmful to children, that interest does not justify a total

suppression of such material, for to do so would reduce the adult population to seeing and reading only what is fit for children. *Butler v. Michigan* 352 U.S. 380, 383, 77 S. Ct. 524, 1 L. Ed. 2d 412 (1957); *Jacobellis v. Ohio*, *supra*."

What the New Jersey court held there is appropriate to the case at bar. The State interest does not justify a total suppression of such interference, it must appear that the injury resulting from the alleged nuisance is or will be irreparable. It must be conceded that the dissemination of a publication will not work irreparable harm.

In the case of *Speiser v. Randall*, 357 U.S. 513, 525 (1958), the United States Supreme Court stated:

"the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn... and the reportation of legitimate from illegitimate speech calls for... sensitive tools."

In 1957, the Court considered a question concerning the constitutionality of a civil injunctive statute from the state of New York, which was designed to supplement the existing conventional criminal provisions dealing with pornography by authorizing the invocation of a "limited injunctive remedy" under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene, and to obtain an order for the seizure in default of surrender, of the condemned publications.

In that case, entitled, *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, the Court approved the statutory scheme as the same was interpreted by the New York Court, and found it constitutionally correct. Time and time again the Supreme Court has pointed to the statute in *Kingsley Books, Inc.* as a procedural model for other state legislatures to follow in supplementing their criminal obscenity statutes.

In commenting on the case of *Kingsley Books, Inc.* in the case of *A Quantity of Copies of Books, et al, v. Kansas*, 378 U.S. [fol. 364] 205 (1964), at page 209, the plurality opinion stated:

"... since P-K was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issued, the procedure was likewise constitutionally deficient. This is the teaching of *Kingsley Books, Inc. v. Brown*, 354 U.S. 436. See *Marcus* 367 U.S. at pp. 734-738. The New York injunction procedure there sustained does not afford ex parte relief but postpones all injunctive relief until 'both sides have had an opportunity to be heard,' *Tenny vs. Liberty New Dist.* 215 NYS 2d 663, 664. In *Marcus* we explicitly said that *Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of those publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene, 367 U.S. at 735-736."

In a later case involving in essence the question common to the present proceeding, of "prior restraint" and "chilling effect", on the exercise of First Amendment rights, the Supreme Court in a case styled, *Freedman v. Maryland*, 380 U.S. 51, at 60 (1965), stated:

"How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme, is, of course, for the State to decide. But a model is not lacking; in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. *That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing.*" (Emphasis supplied).

In a case decided by the Supreme Court in 1968, *Teitel Film Corporation v. Cusack, et al*, 390 U.S. 139, the Court again made comment about the necessity for procedural safeguards in the sensitive area of First Amendment rights.

Finally, in November, 1968, the Court issued its unanimous opinion in a monumental decision entitled, *Carroll v. President and Commissioners of Princess Anne, et al*, 393 U.S. 175, and on the issue of *ex parte* injunctions in First Amendment cases, stated:

"There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate. 'any system of prior restraints comes to this court bearing a heavy presumption against its constitutional validity', *Bantam Books v. Sullivan*, [fol. 365] 372 U.S. 51, 57 (1965). And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in *Freedman v. Maryland*, supra, at page 58, a noncriminal process of prior restraints upon expression 'avoid constitutional infirmity only if it takes place under procedural safeguards, designed to obviate the dangers of the censorship system.'"

In *Gundlach v. Rauhauser*, 304 F. Supp. 962 (1969), the United States District Court for the Middle District of Pennsylvania, Three Judge Court, in declaring a section of that State's obscenity statute to be constitutionally deficient and in permanently enjoining the District Attorney from further proceeding against the plaintiff under that section, stated on page 963:

"It will be noted that Section (g) of the Pennsylvania Act authorizes the District Attorney to institute proceedings in equity for the purpose of enjoining the sale and distribution of any written or printed matter of an obscene nature. Moreover, Section (g) specifically provides for the issuance of a preliminary injunction, ex parte, upon the averment of the District Attorney that the sale or distribution of such publication constitutes a danger to the welfare or peace of the community. Thereafter, a hearing is to be held in conformity with the Rules of Civil Procedure. Plaintiff contends, in this action, (a) that Section (g) of the Pennsylvania Obscenity Statute violated the First Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment, and (b) that the publications and materials involved herein are not obscene in the constitutional sense as a matter of law.

"We need only consider point (a) as it is apparent that Section (g) is defective, in that it provides for the issuance of a preliminary injunction, without notice, in an area involving 'basic freedoms guaranteed by the First Amendment' and, further, that it fails to establish the necessary procedural safeguards to insure prompt and final judicial decision."

In the case styled, *HMH Publishing Co., Inc. v. Oldham*, 306 F. Supp. 495 (1969), the United States District Court for the Middle District of Florida, Ocala Division, vacated a state court ex parte injunction restraining the sale of the magazine *Playboy* unless certain pages containing allegedly obscene matter were deleted and enjoined the state attorney from securing further injunctions without first holding, after due notice, a judicially supervised adversary hearing on the question of obscenity. The complaint which the state attorney filed in the state court against [fol. 366] the Plaintiff was captioned "Complaint Under Florida Statutes, Section 60.05, F.S.A., to Enjoin and Abate a Public Nuisance and Under the Provisions of Florida Statutes 847 Prohibiting the Sale or Distribution of Obscene Lewd Magazines to Minors."

The District Court stated at page 496:

"The injunction was applied for and granted without prior notice and without the holding of any prior adversary hearing to determine the obscenity or illegality of the October 1969 issue of PLAYBOY. The cases are legion which hold that a prior adversary hearing must be held and a judicial determination of the question of obscenity must be obtained before law enforcement officers may move to suppress the dissemination of alleged obscene matter. *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (1961); *Tyrone, Incorporated v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969); *Metzger v. Percy*, 393 F.2d 202 (7th Cir. 1968); *Grove Press Inc. v. City of Philadelphia*, 300 F. Supp. 281 (E.D. Pa. 1969); *City News Center, Inc. v. Carson*, 298 F. Supp. 706 (M.D. Fla. 1969); *Master v. Russell*, F. Supp. (M. D. Fla. 9/24/69); *Morrison v. Wilson*, F. Supp. (N.D. Fla. 9/5/69); *Carter v. Gautier*, 305 F. Supp. 1098 (M.D. Ga. 9/15/69); *Mandell v. Carson*, F. Supp. (M.D. Fla. 10/8/69); *Delta Books Distributors v. Cronvich*, 304 F. Supp. 662 (E.D. La. 1969); *Felton v. City of Pensacola*, 200 So.2d 842 (1st D.C.A. Fla. 1967). This procedure has been adopted because what is obscene and what is not obscene is sometimes separated by a finely drawn line and the Fourteenth Amendment to the United States Constitution requires that regulation by the states of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression."

In the case of *City News Center, Inc. v. Carson*, Case No. 69-268-Civ.-J (U.S.D.C. M.D. Florida—February 25, 1970), the District Court granted a preliminary injunction enjoining the respondents from enforcing the Florida Obscenity Statute, Section 847.011, in an unconstitutional manner against the petitioner and ordered all materials seized or purchased to be

returned to petitioner and to be suppressed as evidence. The Court found that no arrest warrant or search warrant had been obtained from a Justice of the Peace only after the seizure and arrest. In a well reasoned opinion, the Court stated:

"The seizures made here were in flagrant disregard of the constitutional requirements of due process of law which require a prior adversary, judicially-supervised hearing before seizure. Without this [fol. 367] threshold protection, the evanescent freedom of unintimidated expression, guaranteed by the Bill of Rights, becomes meaningless. The great weight of authority now requires a prior evidentiary hearing in all cases regarding seizure of alleged obscenity, whether films or books."

With respect to the issue of probable cause the Court stated:

"Respondents make the contention that the seizures made here were incident to an arrest for the act of selling obscene materials, which alleged illegal act took place in the presence of the arresting officer. In making such an arrest, the officer necessarily was placed in the position of having to determine probable cause that the materials being sold were in fact obscene before the arrest could be made. An ad hoc determination of obscenity by a single officer, uninformed by no more than three weeks of experience with the vice squad and unfamiliar, by study or briefing, with constitutional principles is grossly insufficient to protect against unwarranted infringement of freedom and expression.

"Even with the benefit of experience and briefing on the law, such a procedure would be inadequate because probable cause as to whether obscenity exists has come to be recognized as a matter of *constitutional judgment*, unique in the law because of the fragile nature of the right protected; and incapable of determination by a policeman, grand

jury, or judge acting *ex parte*, without a prior finding of probable cause in a judicially supervised adversary hearing. See e.g., *New York v. Saka*, No. 94/68 (Dutchess County Court, New York, filed Feb. 7, 1969) (dismissal of grand jury indictment because no prior adversary hearing has been had.)

"Consequently, because the delicate nature of the protected right makes the finding of probable cause a matter for constitutional judgment, a prior adversary hearing is necessary before an arrest can be made, even where the sale of allegedly illegal materials takes place in the presence of the arresting officer. *Delta Books Distributors v. Cronvich*, *supra*, at 667."

The Court further added:

"No allegation is made that sales were made to children or that children had been in the room set apart for adults and marked accordingly. See *Ginsberg v. New York*, 390 U.S. 629 (1968). Admission to the room was regulated by an attendant at the door. No allegation is made that pandering or obtrusion on the sensibilities of those adults not wishing to encounter such material has occurred. See *Redrup v. New York*, 386 U.S. 767 (1967).

In accordance with the findings above and those facts reported at 209 F. Supp. 706, this Court finds that the seizures were made in bad faith and for the purpose of suppressing the seized materials during at least the period of prosecution, thereby chilling the public's right to freedom of expression and to receive information, see *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Karalex v. Byrne*, F. Supp. No. 69-665-J-Civ. (D. Mass., Nov. 28, 1969), *injunction* [fol. 368] *stayed*, 38 U.S.L.W. 3221 (U.S., Dec. 15, 1969); *United States v. Thirty-Seven Photographs*, 38 U.S.L.W. 2440 (D.C. Calif. Jan. 27, 1970), and depriving petitioner of its rights to fundamental due process...

"This Court finds that because a prior adversary hearing was not held, a preliminary injunction should issue, and that the materials seized or purchased should be returned and suppressed from use in pending or future prosecutions arising from the events of April 10, 1969."

In the case of *Commonwealth of Pennsylvania v. Guild Theatre Inc., et al.*, 248 A.2d 45, the district attorney proceeded in equity on the common-law theory of public nuisance against the exhibitors of an allegedly obscene motion picture and it was held that:

"*Ex parte* action on the part of the District Attorney in instituting a complaint to restrain the exhibition of a film on the ground of its obscenity and obtaining an injunction from the Court was unconstitutional."

The Court further stated:

"We hold that the Court below erred in granting the injunction and overruling the preliminary objections. The procedure followed in this case was shockingly defective in at least two respects—hearing without notice on the evening of July 19th, and the censorship without provisions for a prompt judicial decision.

"It is true that obscenity is not within the purview of the protections of the First and Fourteenth Amendments . . . however, the very question at issue here is whether this picture is obscene, and *until it is judicially so adjudged, it is entitled to those protections.*" (Emphasis supplied).

In the case styled, *Grove Press, Inc. v. City of Philadelphia*, 300 F. Supp. 281 (1969), the United States District Court for the Eastern District of Pennsylvania granted the plaintiff's motion for a preliminary injunction and enjoined the defendants from further prosecuting any

proceeding attempting to prevent the exhibition of plaintiff's allegedly obscene film on the ground that it constituted a common-law public nuisance. In holding that such a proceeding violated the First and Fourteenth Amendments to the United States Constitution, the Court stated:

"Thus where a state seeks to exercise its power to prevent dissemination of allegedly obscene material it must establish precise objective standards by which the work may be judged, as well as procedural safeguards adequate to insure the constitutionally [fol. 369] protected expression will not be unduly curtailed. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, (L. Ed. 2d 584 (1963)), and *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1964).

"It follows *a fortiori* from those cases in which federal courts have held invalid stat *statutory* schemes regulating obscenity that suppression of expression on the 'common law' ground that it is a public nuisance is necessarily prohibited by the First and Fourteenth Amendments. This conclusion has been recognized by the Supreme Court since the germinal case of *Cantwell v. Connecticut*, 310 U.S. 296, 307-308, 60 S. Ct. 900, 84 L. Ed. 1213 (1939)."

"The City's attempt to enjoin the continued exhibition of 'I am Curious—Yellow' on the ground that such exhibition is a nuisance is a procedure repugnant to the Due Process Clause of the Fourteenth Amendment in two respects; First, the substantive standard by which the alleged obscenity of the movie is to be judged, i.e., whether it is a 'common law nuisance' is so broad as to sweep within its purview not only properly regulated activities but also constitutionally protected activities; and secondly, the same standard is so vague as to be meaningless by those whose activities are sought to be measured by that standard."

"Measuring speech by the standard of common law nuisance fails to avoid either of those significant constitutional objections. See *Near v. Minnesota*, 283 U.S. 697, 707, 51 S. Ct. 625, 75 L. Ed. 1357 (1930)."

On appeal to the U.S. Court of Appeals for the Third Circuit, *Grove Press, Inc. v. City of Philadelphia*, 418 F.2d 82 (1969), the Court there affirmed the District Court's decision but remanded the case for the limited purpose of having the District Court to modify its order to reflect the Circuit Court's precise holding. The Court stated:

"We have concluded that as a standard for regulating First Amendment rights, neither 'injury to the public,' nor 'unreasonableness,' standing alone, is sufficiently narrow or precise to pass constitutional muster. Each is too elastic and amorphous standard by which to restrain the exercise of free expression. *What is encountered with the sprawling doctrine of public nuisance is an attempt to restrict First Amendment rights by means analogous to those under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.*" *Cantwell v. Connecticut*, 310 U.S. 296, 308, 60 S. Ct. 900, 905, 84 L. Ed. 1213 (1940)." (Emphasis supplied):

"The common law of public nuisance may be a perfectly valid method by which to implement a state's police power in certain defined circumstances where, for example, it is used to restrain that which is prohibited by other constitutionally appropriate standards. It may not be used, however, both to define the stand-[fol. 370]dards of protected speech and to serve as the vehicle for its restraint."

"The mischief we perceive in the Pennsylvania equity rules is that there is no guarantee a final hearing will be reasonably scheduled after the issuance of a preliminary injunction and that a prompt decision will be forthcoming thereafter. The preliminary restraint could exist days, and even months, before the judicial decision on the merits; where this possibility exists, an unacceptable threat, to the freedom of expression without due process of law results. Failure to provide the necessary expeditiousness tinges the Pennsylvania preliminary injunctive procedures with unconstitutional hues when they are employed to restrain or inhibit expression prior to a final adjudication of an alleged obscene matter."

In a case decided by a *nisi prius* Court in the State of Rhode Island, on June 27, 1969, involving in part the constitutionality of a state statute authorizing *injunctions* in alleged obscene literature cases, the Providence Court (J. Weisberger, presiding), in a case styled *In Rem Seven Magazines, etc.*, Case No. M.P. 8215, stated in pertinent part:

"In Connection with this complaint an *ex parte* restraining order was issued pursuant to the provisions of 11-31.1-4. This restraining order was issued after examination by the Court of the magazines in question, but without notice to the publishers or sellers or an opportunity to be heard by said publishers or sellers. As a consequence the representatives of the publishers of these four magazines have asked that the *ex parte* restraining order be dissolved. The Court will first address itself to that issue.

"It would seem to the Court that the case of *Joseph Carroll, et al. v. President and Commissioners of Princess Anne, et al.*, decided by the United States Supreme Court and reported in 21 Lawyers Edition

Second 325, (a 1968 case) as well as the *Marcus* case cited in the brief of the Attorney General and also in the brief submitted by the publishers of the four magazines would indicate that the publishers of the four magazines would indicate that the issuance of a restraining order *ex parte* is constitutionally impermissible in relations to matters which affect First Amendment rights.

"As a consequence, the Court is of the opinion that the *ex parte* restraining order heretofore issued was improvidently issued, and the same is hereby quashed."

[fol. 371] The Complaint filed by the State of Florida, although lacking any affirmative showing of compelling need, would perhaps rely upon the concept that the County Prosecutor is attempting to protect society in one of three ways:

- (1) Sales to minors under a state statute reflecting a specific and limited concern therefore;
- (2) Sales to individuals that cause anti-social conduct,
- (3) Sales to individuals whose morals may be impaired by the alleged salacious appeal of this material.

We recognize first that the complaint in this case indicated that there are no sales of these magazines to minors under any statute reflecting the state's specific and limited concern for juveniles as would seem to be constitutionally relevant in the cases of *Redrup v. State of New York*, 386 U.S. 767, at page 768, and *Ginsberg v. New York*, 20 L. Ed. 2d, 195, wherein the Supreme Court approved a statute

designed for juveniles reflecting the state's specific and limited concern.

With respect to the issue of whether the material may cause anti-social conduct by virtue of sales to the interested public, the case of *Stanley v. Georgia*, 22 L. Ed. 2d 542, decided April 7, 1969, in the Supreme Court nullifies this argument by the words of the Court which state:

"Georgia asserts that exposure to obscenity may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion."

A footnote at this point states:

"See e.g., Cairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962); see also Jahoda, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954), summarized in the concurring opinion of Judge Frank in *United States v. Roth*, 237 F.2d 796, 814-816 (C.A. 2d Cir. 1956).

"More importantly, if the State is only concerned about literature inducing anti-social conduct, we believe that in the context of private consumption of ideas and information we would adhere to the view that 'among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . ' Given the present state of knowledge, the State may no more [fol. 372] prohibit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the grounds that they may lead to the manufacture of homemade spirits."

As to the third possible argument that could be anticipated from the State in attempting to justify the extraordinary relief sought here to abate a nuisance under a statute which is alleged to be unconstitutional, we would assume that the State asserts the right to protect the individual's mind from the effects of obscenity. The Supreme Court in *Stanley v. Georgia*, *supra*, stated:

"We are not certain that this argument amounts to anything more than the assertion that the state has the right control the moral content of a person's thoughts."

A footnote at this point states:

"Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible, in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the 'consumer' Obscenity, at bottom, is not crime. Obscenity is sin." Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Col.L. Rev. 391, 395 (1963).

"To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment."

In a 1936 case discussing the impact and permissible limitations on the exercise of First Amendment rights, *Herndon v. Lowry*, 301 U.S. at page 258, the Court stated:

"The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government: The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the constitution."

In *Bantam Books v. Sullivan*, 372 U.S. 58, the Court said:

"It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity...without [fol. 373] regard to the possible consequences for constitutionally protected speech. *Marcus v. Search Warrant of Property*, 367 U.S. 717, 730, 731, 6 L.Ed. 2d 1127, 1135, 1136, 81 S. Ct. 1708.

"Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith v. California*, 361 U.S. 147, 4 L.Ed. 2d 205, 80 S. Ct. 215; *Marcus v. Search Warrant of Property (US) supra*, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. Any system of prior restraints of expression comes to this Court bearing a heavy presumption

against its constitutional validity. See *Near v. Minnesota*, 283 U.S. 697.

(Footnote) "Nothing in the Court's opinion in *Times Film Corp. v. Chicago*, 365 U.S. 43, 5 L. Ed. 403, 81 S. Ct. 391, is inconsistent with the Court's traditional attitude of disfavor toward prior restraints of expression. The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional under all circumstances. In declining to hold prior restraints unconstitutional per se, the Court did not uphold the constitutionality of any specific such restraint. Furthermore, the holding was expressly confined to motion pictures."

Schneider v. Irvington, 308 U.S. at 159:

"The freedom of speech and of the press secured by the First Amendment against abridgment by the United States, is similarly secured to all persons by the Fourteenth against abridgment by a state.

"Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify [fol. 374] such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weight the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

Terminiello v. Chicago, 337 U.S. 1:

"That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

In a decision of the USDC for the E.D. of La., New Orleans Division, *Delta Books v. Cronvich*, 304 F. Supp. 662, with a panel of three Judges, two of the three constituting a majority, it was held in essence that judicially superintended adversary hearings were constitutionally required on the issue of obscenity *vel. non* prior to an arrest of a book seller even when the publications were the subject of a purchase, not a seizure.

The exact language of the Court in this regard was as follows:

"Since prior restraining upon the exercise of First Amendment rights can be exerted through seizure (with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizure and arrest, the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity."

The Court went on to say:

"It is left to those states seeking to regulate obscenity to devise constitutionally acceptable procedures for the enforcement of any such regulations. However, these procedures, among others, may have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity.

"Applying these principles to the cases before us, the arrests, as well as the seizures claimed to be incident thereto, are clearly invalid for lack of a prior adversary determination of the obscenity of the materials upon which the arrests and seizures were based. The fact that in each case some materials were purchased, rather than seized, is of no moment in view of the requirement of an adversary determination of obscenity prior to arrest or threat of arrest.

[fol. 375]

"To the extent that this contention is based upon the lack of the required procedural safeguards prior to seizure or arrest, it has been disposed of by what we have hereinabove held with respect to the necessity of an adversary judicial determination of obscenity."

In a case decided on September 19, 1969, the United States District Court for the Southern District of Georgia, Chief Judge Lawrence presiding, styled *Mike Sokolic v. Leo B. Ryan, et al.*, 304 F. Supp. 213 (1960), it was stated:

"The idea that a criminal prosecution and threats or probability of further prosecutions does not chill one's First Amendment rights is judicial illusion. That fact was recognized in *Dombrowski v. Pfister*, 380 U.S. 479. There the Supreme Court enjoined prosecutions under Louisiana's Subversive Activities Act where the statute was facially unconstitutional and where the authorities continued to prosecute under it. *Dombrowski* would not seem to apply to criminal prosecutions commenced under ostensibly valid state statutes whose constitutionality is not challenged. However, an extension of the teaching of that case has been seen in several recent First Amendment cases. In *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622, a New York District Court recognized that practices short of actual seizure of books may operate to deny constitutional rights and enjoined the defendants in a case where police officers were constantly present in the book store. In *Poulos v. Rucker*, 288 F. Supp. 305, An Alabama District Court, citing *Bantam Books v. Sullivan*, 372 U.S. 58, recognized that criminal prosecution or the threat thereof prior to an adversary determination of obscenity constitutes an unconstitutional burden upon freedom of expression. In that case, however, the controversial materials were declared to be non-obscene and it was therefore unnecessary to enjoin state prosecution.

"The most recent case appears to be *Delta Book Distributors et al v. Cronvich et al*, (Ed. of La. No. 68-1927 and 69-322). There, Judge Boyle, speaking for a three-Judge District Court said: 'since prior

restraint upon the exercise of First Amendment rights can be exerted through seizure (with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizure and arrest, the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity.

"The Court did not enjoin the state court but indicated its holding should be sufficient to produce the same result without a restraining order.

"I take the same course in the present case. Any criminal prosecution here prior to an adversary hearing and without plaintiff having the subsequent opportunity to refrain from selling materials determined to be obscene is violative of his First Amend- [fol. 376] ment rights. The materials seized were unconstitutionally taken. For all their filth, they must be returned to their pandering vendor. To this pass has judicial latitudinarianism brought us in the censorial field.

...
 "What the courts have done, clumsily perhaps, is to try to strike a balance between private and public rights — the right of an individual to free, legitimate expression, on the one hand and, on the other, the right to the public to be free from that expression which is obscene. There is nothing to prevent diligent state prosecutors from instituting adversary proceedings before a judicial officer through notice to the distributor and a subpoena duces tecum directed to it with the name of each questionable and challenged publications. Following a judicial determination of obscenity the state authorities may

seize and prosecute if the publications and materials are put on sale. And this is all the clearer where State procedures are modernized."

The Supreme Court for the State of Florida in *Reaver v. Martin Theaters of Florida*, 52 So.2d 682, had before it the implimentation of injunctive relief directed against a drive-in theater and stated the following of nuisance abatement:

"Under the familiar maxim 'sic utere tuo ut alienum non laedas,' it is well settled that a property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property which is recognized and protected by law, and so long as his use is not such a one as the law will pronounce a nuisance."

and of drive-in theaters stated:

"The operation of a drive-in theatre is not, per se, a nuisance; it is as legal a use of his premises by the defendant as is the operation of an airport by the plaintiff."

The Supreme Court for the State of New York in *Larkin v. G.I. Distributors, Inc.*, 245 N.Y.S.2d 553, similarly held that the definition of obscenity is the same whether the mode of proscription be civil or criminal. How can dissemination be proscribed as a nuisance when the publications have not been disseminated. See also *Redrup v. New York*, 386 U.S. 767.

In the more than three decades since *Near v. Minnesota*, the law has not been altered in any respect to permit the state to do by indirect means that which it could not do directly. Therefore dissemination cannot be suppressed as a

nuisance when the [fol. 377] same cannot be proscribed after dissemination. To abate as a nuisance before dissemination is nothing more than preventing the unknown for the material is precluded from the outset. As the court stated in *Near*:

"This statute, for the suppression as a nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved . . .

"This suppression is accomplished by enjoining publication and that restraint is the object and effect of the statute.

"The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the state imposes an unconstitutional restraint upon publication."

Therefore based upon the holding of *Near* and the subsequent cases it is apparent that no state may constitutionally suppress publication merely upon the basis that their dissemination constitutes a nuisance.

Paragraphs 8, 9, and 10 of the original sworn complaint outlines the chronology and the procedure that resulted in Judge Fitzpatrick's April 6 order closing down the Panama City Book Mart on the basis of its being a nuisance. The transcript of the hearing held on April 3, 1970, is before this Court. The record clearly reflects that there was no basis for a finding of obscenity of six documents but once that finding of obscenity was made it then served as a support and platform for the unwarranted finding of a public nuisance. Once a public nuisance was found it was a simple step to

enjoin a legitimate business by ordering it shut down. The June 19, 1970 hearing by Judge Fitzpatrick which preceded his June 25, 1970 order contained no evidence or testimony. The transcript of the hearing is also before the Court as well as that order. Despite the fact that there could be no determination of obscenity because there was no evidence other than the publications themselves, 80 publications were determined to be obscene and the determination of obscenity was again the platform for the determination of a nuisance which nuisance then was the platform for the issuing of an injunction which carried out a second [fol. 378] effective massive judicial seizure.

Accordingly, it is submitted that Section 823.05, Florida Statutes, is void because the standards permitting presumptively protected expression to be enjoined and declared to be a nuisance rests solely on the grounds that the same "tends to annoy the community," or "tends to injure the health of the community", or "tends to become manifestly injurious to the morals of the people." These terms are unconstitutionally vague and broad and are in violation of the First and Fourteenth Amendments to the Constitution of the United States. The terms "nuisance" and "annoy the community" and "injure the health of the community" and "become manifestly injurious to the morals of the people" are phrases that are so vague, indefinite and broad that they do not afford any reasonable standard for the imposition of restraint upon the freedom of expression.

Judge Fitzpatrick's application of the nuisance law clearly demonstrates that there is no requirement nor assurance in the nuisance statute nor in any provision of the law of Florida of a prompt judicial decision, including appellate review of the question of whether the action described in

823.05 is a nuisance, and whether it is enjoinable. It has been approximately 60 days since arguments were heard by the First District Court of Appeal on June 3, 1970, without its ruling on Judge Fitzpatrick's outrageous order. The Panama City Book Mart which is presently closed in compliance with Judge Fitzpatrick's order would have been closed from April 6, 1970 to the present except for a merciful intervention of this Court. Clearly there is no provision in the statute or elsewhere in the laws of Florida which requires or assures any restraint of Judge Fitzpatrick's action or that it shall be postponed until the final judicial determination of the question of nuisance bottomed upon obscenity can be made. Clearly Section 823.05 is void as written and is void as applied for the lack of procedural safeguards, for the lack of precise objective standards, and for its vagueness.

This Court should declare that the State of Florida may [fol. 379] not condemn the dissemination of presumptively protected First Amendment material as a nuisance. This Court should declare that the State of Florida may not under the label of abating a nuisance suppress by prior restraint and chilling effect the First Amendment freedom of conducting a lawful business selling presumptively protected material. What we really have here is the application of an unconstitutional statute (823.05) bottomed upon another unconstitutional statute (847.011) in an effort to suppress publications that are personally offensive to the police or to a member of the judiciary.

Certificate of Service (omitted in printing).

Paul Shimek, Jr.

[fol. 380]

In the United States District Court for the
Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

—vs.—

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, et al, Defendants.

MOTION TO DISMISS—Filed July 30, 1970

Comes now the Defendant, Clinton E. Foster, and files this his Motion to Dismiss the amended complaint and for grounds of said motion says:

1. That the same fails to state a cause of action against him and fails to state a claim upon which relief can be granted insofar as it attempts to fix legal responsibility upon him as Prosecuting Attorney of Bay County, Florida, or upon him individually.

Harrell, Wiltshire, Bozeman,
Clark and Stone

By Joe J. Harrell

ANSWER

Subject to the foregoing motion to dismiss the Defendant, Clinton E. Foster, as Prosecuting Attorney of Bay County, Florida, files this his answer and says:

1. He admits that numerous documents were subpoenaed and [fol. 381] that an order was entered by Judge Fitzpatrick dated June 25, 1970, but he denies that Plaintiff was prevented from operating and maintaining a business at the location in question. He is without knowledge as to whether the publications recited in the order were located on the premises.

2. He denies that the massive seizure was aided and abetted by Clinton E. Foster.

And for further answer Clinton E. Foster says that at all times he was acting in his official capacity and not in his individual capacity.

And for further answer the Defendant, Clinton E. Foster, denies that he has committed any acts, which would support a contempt proceeding against him, but if such a proceeding be had that he respectfully requests trial by jury.

And for other and further answer the Defendant, Clinton E. Foster, adopts all of the matters and things heretofore set forth in his original answer.

Harrell, Wiltshire, Bozeman,
Clark & Stone

By Joe J. Harrell

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[fol. 382]

In the United States District Court for
the Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

—vs.—

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, et al, Defendants.

**BRIEF OF DEFENDANT, M. J. "DOC"
DAFFIN AS SHERIFF OF BAY COUNTY,
FLORIDA—Filed August 14, 1970**

[fol. 383] This Brief is being submitted as directed by
the Court.

1. It is the contention of this Defendant that this case
should be dismissed as to him.

2. The Plaintiff should be required to pay this Defendant
witness fees and mileage for answering witness subpoenas to
attend hearings in Pensacola, which subpoenas were served
upon this Defendant.

The main thrust of the Complaint in this case was to enjoin further prosecution in the State Court of certain persons then pending for violation of certain state laws. The Court has now refused to grant injunctions (Title 28 USCA Sec. 2283) and the determination by this Court of the constitutionality of the state laws challenged in this proceeding by way of Declaratory Decree could serve no useful purpose without the benefit of injunctive relief and the validity of these same statutes are being attacked in litigation pending in State Court.

Under Federal procedure rules, a litigant is required to state a claim against the Defendants named and if no claim is stated against a particular Defendant, then the suit should be dismissed against that Defendant, otherwise, if it were not necessary to state a cause of action against a Defendant, then there would be no limit or end to the Defendants who could and would be named in any given case. There [fol. 384] are no sufficient allegations contained in this Complaint to show any duty by the Sheriff or breach of that duty or to involve the Sheriff in what is left of this suit in attempting to procure Declaratory Judgment or Decree as to validity of certain State Statutes and thus Defendant is neither a proper nor necessary party.

Declaratory Judgments are authorized under proper circumstances. (Title 28 USCA Secs. 2201 and 2202).

There was held in *ROSENSTIEL vs. ROSENSTIEL*, 278 Fed. Sup. 794 (New York), provisions of the Declaratory Judgment Act create no statutory exception to Title 28 Sec. 2283 (the Anti-Injunctions Statute), citing *MARYLAND CASUALTY COMPANY vs. PACIFIC COAL AND OIL COMPANY*, 312 US 270; 61 Sup. Ct. 510; and 85 L. ED 826.

In the case of **HOLLOWAY HOUSE PUBLISHING COMPANY vs. SHARPE** (USCA 9TH CIRCUIT, 408 Fed. 2nd 656), a suit for Declaratory Judgment and Injunction (claiming Plaintiff's business was damaged) was filed against a city attorney and a Chief of Police who were prosecuting certain vendors of a book claimed by the city attorney to be obscene. The District Courts applied the doctrine of abstention and this was affirmed by the Circuit Court of Appeals holding this to be a proper case for the application of the doctrine of abstention. Abstention is a remitting of the parties in a pending Federal Court Action to a State Court for a decision of a question of State Law with a determination of the other issues by the Federal Court; or upon the election of the party remitted to the State Court for a complete and final adjudication by that Court of the entire Controversy. **SUN INSUR- [fol. 385] ANCE OFFICE, LTD. vs. CLAY**, 319 Fed. 2ND 505, 508.

Where difficult and unsettled questions of State Law are enmeshed with Federal questions in determining validity and constitutionality of State Law or State Action under "Abstention" doctrine proper exercise of Federal jurisdiction requires that controversy be decided in state tribunal preliminary to consideration of underlying Federal question by Federal Court. Div. 1287 **Amalgamated Assn. of St. Elec. Ry. and Motor Coach, Emp. of AM AFL-CIO vs. DALTON DCMO**, 206 Fed. Supp. 629, 633. This Defendant feels that under all the circumstances the Court should apply the doctrine of abstention.

USCA TITLE 28 Sec. 1861 provides witness fees of \$20.00 per day and a travel allowance of 10-cents per mile for witnesses summoned to appear in Federal Court. Although

this Defendant is a party to the case, he was made witness by the issuance at the request of the Plaintiff of a witness subpoena for his attendance at certain hearings in Pensacola and this Defendant was required to travel from Panama City to Pensacola in answer to the witness subpoenas and the Plaintiff failed to pay this witness the required witness fee and mileage on the occasions complained of and the Plaintiff should now be required to do so.

Witnesses do not lose their rights to per diem and mileage by not insisting upon prepayment and the parties summoning them being bound to pay for such services. *YOUNG vs. MERCHANTS INSURANCE COMPANY*, 29 Fed. 273.

The Defendant, M. J. "DOC" DAFFIN, as Sheriff, therefore urges [fol. 386] that this case should be dismissed as to him and that the Court should apply the doctrine of "Abstention" and that the Court should require the Plaintiff to pay this Defendant the witness fees and mileage incurred.

Respectfully submitted,

Davenport, Johnston & Harris

By Mayo C. Johnston

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[fol: 387]

In the United States District Court
for the Northern District of Florida
Pensacola Division
PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiffs,

—vs.—

Clinton E. Foster, as Prosecuting Attorney of Bay County, Florida; M. J. "Doc" Daffin, as Sheriff of Bay County, Florida, and the Honorable W. L. Fitzpatrick, as Circuit Judge of the Fourteenth Judicial Circuit in and for Bay County, Florida, Defendants.

**MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS FOR LACK OF
JURISDICTION—Filed August 14, 1970**

PRELIMINARY STATEMENT

On March 30, 1970, the State of Florida, by and through Clinton E. Foster, the Prosecuting Attorney in and for Bay County, Florida, filed a complaint against Robert Mitchum, Dave Ballue and Clarence Howard Cantey under §§823.05 and 60.05, Florida Statutes, seeking to have the business known as "The Book Mart," located at 19 Harrison Avenue,

Panama City, Florida, declared a nuisance. By said complaint a prayer for a temporary injunction pending final judgment and upon final hearing a final judgment abating said nuisance was requested.

Notice of hearing was given to the adverse parties on March 31, 1970, and on April 3, 1970, a hearing was had for the issuance of a temporary restraining order after due notice. [fol. 388] At said hearing, counsel for defendants in the state cause made a complete and total assault upon the constitutionality of the above-mentioned sections of the Florida Statutes, as well as §847.011. Attached hereto and made a part hereof as Defendants' Exhibit A is a true and correct copy of the transcript of proceedings had before the Honorable W. L. Fitzpatrick, Circuit Judge, in and for Bay County, Florida. Reference to pages 46-49 clearly and unequivocally demonstrates that counsel presented a constitutional assault upon said statutes. On April 6, 1970, the defendants in said state action suffered an adverse ruling and on the following day instituted an appeal in the District Court of Appeal, First District, of the interlocutory order. See Exhibit A attached to motion to dismiss filed by the defendants herein dated July 8, 1970. On April 23, 1970, the plaintiffs herein - defendants in the state cause - filed an 85-page brief in the District Court of Appeal, First District, which likewise assaulted the constitutionality as well as the interpretation of §§847.011, 823.05 and 60.05, Florida Statutes. Attached hereto and made a part hereof by reference is a true and correct copy of said brief, the same being marked as Defendants' Exhibit B.

Subsequent thereto, to wit: on or about April 30, 1970, Robert Mitchum filed a "Complaint for Preliminary Injunction, Permanent Injunction, Declaratory Judgment,

Damages and Convocation of a Three-Judge Court," assaulting the constitutionality of the foregoing statutes. On May 11, 1970, this Court, through the Honorable Winston E. Arnow, held a hearing on the plaintiffs' application for temporary restraining order. At said hearing, the undersigned appeared on behalf of the defendants, Clinton E. Foster, M. J. "Doc" Daffin, and in opposition to the application for temporary restraining order presented an oral motion to dismiss for lack of jurisdiction predicated upon petitioner's submission of his federal claims to the state court specifically [fol. 389] citing to the court *England v. Louisiana State Board of Medical Examiners*, (1965), 375 U.S. 411; *Brown v. Chastain*, (5th Cir. 1969), 416 F.2d 1012; and *Paul v. Dade County*, (5th Cir. 1969), 419 F.2d 10. On that same date, the Honorable Winston E. Arnow entered an order denying defendants' motion to dismiss.

Amended complaints were thereafter filed to which defendants filed a written motion to dismiss citing *England v. Louisiana Board of Medical Examiners*, *supra*.

ARGUMENT

At the hearing before the court on July 16, 1970, counsel for the defendants herein urged that this Court lacked jurisdiction in the cause in light of the fact that the plaintiffs had already litigated the federal questions here presented in the state courts of Florida and that, having suffered an adverse ruling, had appealed said ruling to the District Court of Appeal, First District, State of Florida. At that time, counsel for plaintiffs candidly admitted he did not reserve his federal claims. Of course, counsel's abortive attempt to reserve his federal questions in the answer recently filed in the Circuit Court, a copy of which was mailed to the members of this Court on July 17, 1970, is too little, too late.

What plaintiffs, in effect, have sought to accomplish is to reserve their federal constitutional claims after having voluntarily submitted said claims to Florida's state courts, literally forcing them to rule upon the validity of those claims. They now seek to play off the state courts against this federal court hoping to secure a more favorable ruling in one than the other.

During the argument before this Court, plaintiffs' counsel suggested they had no option since Florida had elected the forum in which it was going to proceed against them. Not much of an election when one considers that, of necessity, a state attorney's authority to function in his capacity is limited to the several circuit courts in his circuit. In short, he has no choice to make. The same argument applies, of course, across the board to all prosecutorial levels whether they be county or municipal, so it is meaningless to say that because defendant went to the only court open to him, that plaintiff was obliged to litigate in the state courts.

In truth and fact, a litigant has a choice whether to initially raise his federal claims in a state court or a federal court. *England v. Louisiana State Board of Medical Examiners*, supra. So it is that if he chooses to reserve his federal claims for future action in federal courts, he should only give the state courts notice of his federal claims and not litigate them. Should he follow this procedure, he can, in effect, reserve his federal claims for presentation to a federal court. *Id.* In short, there is no way in which a litigant can be compelled to initially litigate his federal claims in state court.

In *England*, supra, the United States Supreme Court unequivocally held the following:

"We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there and has them decided there, then... he has elected to forego his right to [litigate them by a three judge panel]." 375 U.S. at 419.

[fol. 391] How they can, in the face of that observation, now seek to relitigate the issues already raised and acted upon by our state courts escapes defendants.

In truth and fact, by bringing the matter to the attention of the lower court and compelling it to rule on their federal claims, they have literally destroyed the jurisdiction of the federal courts to hear these claims. It is beyond cavil that no United States District Court possesses appellate jurisdiction over state courts. *Atlantic Coastline Railroad Company v. Brotherhood of Locomotive Engineers*, (1970), 38 L.W. 4471, --- U.S. ---. Thus, when a litigant procures a state trial court ruling on a constitutional issue, his sole remedy is to appeal that ruling through the state courts and to take certiorari to the United States Supreme Court. He may not seek adjunctive relief to have a federal court review that ruling by the simple expedient of either an application for declaratory or injunctive relief. *Sexton v. Barry*, (6th Cir. 1956), 233 F.2d 220, 226.

Several recent federal decisions dealing with Florida litigants make this point crystal clear. In the first case a mother raised and litigated in the Florida courts her right to a free transcript in a child custody case and lost. She then presented this same issue to the federal courts in an application for declaratory and injunctive relief and the Fifth Circuit held it lacked jurisdiction to hear the matter stating:

"State courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can relitigate federal claims which have been presented to and decided by state courts." *Brown v. Chastain*, (5th Cir. 1969), 416 F.2d 1012, 1014.

[fol. 392] Even more recently in the Dade County cross-on-the-courthouse case this federal jurisdictional limitation was reaffirmed and the court further held, "It is clear that [prior U.S.] Supreme Court or other appellate review had nothing to do with the jurisdictional question decided in *Chastain*. *Paul v. Dade County*, (5th Cir. 1969), 419 F.2d 10.

More particularly, in *Paul*, supra, Judge Dyer citing *England*, supra, and other cases, was explicit in his position that a litigant, having presented the matters to a state court, literally deprives a federal court of jurisdiction to enter the cause and, in effect, set itself up to review the propriety of state court proceedings in the matter. He very pointedly and definitely held it to be a jurisdictional barrier beyond which the Fifth Circuit Court of Appeals was either not able or willing to go.

Of even greater significance is the case of *Eitel v. Faircloth*, (S.D. Fla. 1970), 311 F. Supp. 1160, wherein the federal plaintiffs brought an action for declaratory and injunctive relief alleging §317.981, Florida Statutes, (motorcycle crash helmet law) was unconstitutional. In that case, as in this, the plaintiff did not initially elect the forum for *Eitel* was the victim of an information which had been filed against him for failing to wear said protective headgear

as required by the statute. A final judgment had not been had in the matter as plaintiff was the recipient of a favorable ruling on a motion to dismiss. The state appealed said order and the same was reversed by the Florida Supreme Court, remanding the cause for further proceedings.

[fol. 393] The three-judge court dismissed the case for lack of jurisdiction citing *Brown v. Chastain*, supra, and *Paul v. Dade County*, supra.

It is interesting to note that Lloyd Miller's cause was, at the time of the filing of the federal complaint, then pending in the Third District Court of Appeal, State of Florida; but inasmuch as the Florida Supreme Court had pending the constitutionality of the helmet law and the plaintiffs' prospect of success looking slim, Miller turned to the federal court for relief. The court in dismissing Miller's complaint stated:

"... While this is not a pure Chastain situation, it is pure enough. This Court will not provide a forum for a disgruntled litigant to relitigate federal claims which have been presented to and decided by state courts."
311 F.Supp. at 1163.

In view of the fact that this very Court in the case of *Davis v. Adams*, (U.S.N.D. Fla. 1970), case number TCA 1615, decision rendered 7-17-70, not yet reported, relying upon the foregoing cases, dismissed an action because the plaintiff freely and voluntarily litigated his federal claims in the state court even though the court found the statute unconstitutional on the same day in a case filed by a different individual in an identical position who had no litigated his federal claims in the state courts, this court should likewise dismiss this action, which contains the same jurisdictional defect as in *Davis*.

The defendants respectfully submit that the plaintiffs herein, without question, presented their federal constitutional claims and have suffered an adverse ruling thereon, the correctness of which is presently before the appropriate appellate court of this state. Being dissatisfied with such [fol. 394] ruling, he has elicited relief from this Court. The foregoing authorities clearly and unequivocally preclude such action. It matters not how he first arrived in the state courts or that the judgment is not "final" in the legal sense. What is crucial is that rather than reserving his claim, he tendered it and, having done so, obtained an adverse ruling appealable in nature. The plaintiffs' remedy is on direct appeal or by way of certiorari to the United States Supreme Court, not by a separate action seeking declaratory or injunctive relief. *Brooks v. Briley*, (D.C. Tenn. 1967), 274 F. Supp. 538, affirmed 391 U.S. 361.

For the foregoing reasons the complaint, the amended complaint and/or supplement should be dismissed with prejudice for want of jurisdiction.

Alternately, and even *assuming* this Court concludes it has jurisdiction, there is no question but that the court in the exercise of its discretion should decline to grant plaintiffs' prayer for declaratory relief.

First and foremost is the fact that there are unresolved questions of state law which may obviate the need for this Court to pass upon any federal question. Indeed, Judge Arnow's order of May 12, 1970, notes that §60.05, Florida Statutes, requires interpretation in view of the action taken

by the Circuit Court. That independent state ground may or may not resolve all disputes between the parties.

[fol. 395] This being the case, this Court should abstain from passing on the matter. *Douglas v. City of Jeanette*, (1943), 319 U.S. 157; *Milky Way Productions, Inc. v. Leary*, (D.C.S.D. N.Y. 1969), 305 F. Supp. 288, affirmed 90 S. Ct. 817, (1970), see particularly footnote 8 at 355 F. Supp. at 293.

Zwickler v. Koota, (1967); 389 U.S. 349, previously relied upon by party plaintiffs in cases such as this, does not support the argument that they are entitled to declaratory decree as a matter of right. This is made clear beyond all doubt by the Supreme Court's ruling in the case of *Reetz v. Bozanich*, (1970), ——— U.S. ———, 25 L. Ed. 2d 68, a unanimous decision rendered by the United States Supreme Court. Justice Douglas clearly distinguished *Zwickler* by noting that in that case (*Zwickler*) the "state statute was attacked on the ground that *on its face* it was repugnant to the First Amendment *and* it was conceded that a state court construction could not render unnecessary a decision of the First Amendment question." After noting this distinction, the court held the federal court abused its discretion in not staying its hand while the parties repaired to the state courts for a resolution of their state constitutional questions, notwithstanding the fact that substantial economic injury would be the result concluding economic injury was not sufficient irreparable injury justifying federal interference.

Inasmuch as there are unresolved questions of state law and the alleged injury involved in this case is one of economic loss of profits; *Carter v. Gautier*, (M.D. Ga. 1969), 305 F. Supp. 1098, this Court, even assuming it otherwise possesses

jurisdiction over the subject matter, should abstain from disposing of the questions raised by the plaintiffs. Of course, the [fol. 396] fact that the plaintiffs have sought a resolution in the state courts, assuming it is not a jurisdictional bar, should be a factor taken into account in exercising sound discretion of whether to grant declaratory relief. Moreover, the situation is aggravated by the fact that even if this Court concludes the plaintiffs are right on the merits, this Court is powerless to alter, amend or vacate the existing state court injunction. *Atlantic Coastline Railroad Company*, supra. Rather than engage in a duplication of judicial labor, it is respectfully urged that this Court decline to grant declaratory relief thereby requiring plaintiffs to pursue their remedies in a proper and orderly fashion.

Respectfully submitted,

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for Defendants Clinton E.
Foster and Judge Fitzpatrick.

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Joe Harrell, Co-counsel for
Defendant Clinton E. Foster

Counsel for Defendants

[fol. 398]

In the Circuit Court, Fourteenth Judicial
Circuit, In and for Bay County, Florida

Case No. _____

State of Florida, Plaintiff,

-vs.-

Robert Mitchum, et al, Defendants.

Defendants' Exhibit A—Filed April 7, 1970

This cause came on before the Honorable W. L. Fitzpatrick, Circuit Judge of the Fourteenth Circuit of Florida, in open court at the Bay County Courthouse, Panama City, Florida, on the 3rd day of April, 1970.

[fol. 399-447] These pages omitted in printing since they are duplications of [fol. 36 through 84] and are printed herein as pages 39 through 71.

[fol. 448]

Defendants' Exhibit B
In the District Court of Appeal,
First District, State of Florida
Docket No. N-270

Robert Mitchum, Dave Ballue, Clarence Howard Cante, a business known as The Book Mart, a certain portion of land and building located at 19 Harrison Avenue, Panama City, Florida, and all other persons claiming any right, title or interest in the property affected by this action, Appellants,

-VS.-

State of Florida, Appellee.

BRIEF OF APPELLANT—Filed April 23, 1970

On Appeal from the Circuit Court, Fourteenth Judicial Circuit of the State of Florida, in and For Bay County.

[fol. 449] TOPICAL INDEX (omitted in printing).

[fol. 450-457] TABLE OF AUTHORITIES (omitted in printing).

[fol. 458]

STATEMENT OF THE CASE

This is an interlocutory appeal from the Circuit Court, Fourteenth Judicial Circuit, in and for Bay County, Florida. The appellants were the Defendants below and the appellee was the Plaintiff.

In this brief the parties will be referred to as the appellants and the State of Florida. The appellants refer to the pages of the transcript but assign no alphabetical designation [fol. 459] thereto.

This cause commencing with a complaint filed by Clinton E. Foster, Prosecuting Attorney of Bay County, Florida, on behalf of the State of Florida on March 30, 1970. Personal service of process was effected upon one Dave Ballue. A trial was held on April 3, 1970, on the State of Florida's request that a temporary injunction issue without bond against the appellants continuing the conducting of a nuisance. On April 6, 1970, the trial court found six of the twenty-five magazines presented into evidence to be obscene. The court also found that the sale of the six magazines constituted a nuisance, and granted the State of Florida a temporary injunction, shutting down the business known as The Book Mart at 19 Harrison Avenue, Panama City, Florida. On April 6, 1970, appellants filed a motion for supersedeas which on April 9, 1970, was denied by the trial court. On April 7, 1970, the appellants filed this appeal assigning numerous errors and on April 10, 1970, filed a motion to review the trial court's order denying appellants' motion for supersedeas. On April 15, 1970, appellants argued that motion. At the time of this brief there has been no disposition of the motion by the First District Court of appeal.

POINTS INVOLVED

Points involved are as follows:

- I. THE COURT ERRED IN FINDING THE SIX PUBLICATIONS OBSCENE BECAUSE THE CONSTITUTIONALITY PROPER TEST OF OBSCENITY REQUIRES MATERIAL TO SUBSTANTIALLY DEPICT SEXUAL CONGRESS BEFORE IT CAN BE PROSCRIBED.
- II. THE COURT ERRED IN CREATING JUDICIALLY AN UNLAWFUL PRIOR RESTRAINT, JUDICIALLY SEIZING BY INJUNCTION WHERE THERE HAS BEEN NO ADVERSARY HEARING DECLAR- [fol. 460] ING THE 19 MATERIALS OBSCENE, NOR THE THOUSANDS OF PUBLICATIONS LOCATED WITHIN THE STORE BUILDING LOCATED AT 19 HARRISON AVENUE, PANAMA CITY, FLORIDA.
- III. ABATEMENT OF ALLEGED NUISANCE NOT SUFFICIENT JUSTIFICATION FOR PRIOR RESTRAINT OF FIRST AMENDMENT FREEDOMS.
- IV. SECTION 847.011 et seq. OF THE FLORIDA STATUTES ANNOTATED IS VOID FOR VAGUENESS AND IMPERMISSIBLE OVERBREADTH IN THAT THE SAME FAILS TO SUFFICIENTLY DEFINE OBSCENITY AND THAT IT FORBIDS OR REQUIRES THE DOING OF AN ACT IN TERMS SO VAGUE FLUID AND INDEFINITE THAT MEN OF COMMON INTELLIGENCE MUST NECESSARILY GUESS AT

THE MEANING AND DIFFER AS TO ITS APPLICATION AND THEREFORE THE AREA OF PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS IS INVADED.

STATEMENT OF THE FACTS

Due to the nature of the points involved, the issue on this appeal is limited to the interpretation of *Sections 847.011, 823.05, and 60.05* of the Florida Statutes. The only fact necessary for a determination of this appeal are those recited in the testimony of Thomas J. McAuley found on page 27 through 41 of the transcript of the record.

[fol. 461]

ARGUMENT

I. THE COURT ERRED IN FINDING THE SIX PUBLICATIONS OBSCENE BECAUSE THE CONSTITUTIONALLY PROPER TEST OF OBSCENITY REQUIRES MATERIAL TO SUBSTANTIALLY DEPICT SEXUAL CONGRESS BEFORE IT CAN BE PROSCRIBED.

The lower court found six of the twenty-five magazines presented in evidence to be obscene. The only testimony on the question of obscenity is that offered by Thomas J. McAuley who on page 38 of the transcript of the testimony admitted that he saw no sexual contact but merely felt that in his opinion he detected perversion. When asked, if the books depicted a collection of young women demonstrating clearly their genitalia exposed, with the camera being focused on the rectal, penis, or the genital area, counsel was referring to the partial description of the magazine "Exclusive" which Judge Haynesworth in *Central Magazine Sales Limited v.*

U.S.A., 373 F.2d 633, affirming 253 F. Supp. 485, announced was obscene, which decision was reversed in 389 U.S. 50 by the United States Supreme Court. As a matter of law this description of a publication was one that was not obscene, but the witness considered that it was. Counsel's motion to strike the Chief of Police's testimony on the grounds of hearsay, obvious bias, no predicate as to standards of the community, no testimony as to redeeming social value, no testimony as to a prurient interest, was denied. The record is totally devoid of evidence [fol. 462] which will support a finding of obscenity. The record clearly reflects that counsel had no opportunity to prepare, nor to locate witnesses to present on such short notice, and that in fact no "adversary hearing" really occurred. But regardless of what the hearing may be called, there simply is no evidence to establish in a competent court of law reviewing the proceeding that the materials declared to be obscene are in fact obscene.

What is obscene today will undoubtedly shock this court. But it is the law as handed down by the United States Supreme Court which this court must acknowledge and follow. This writer knows better than to devote fifteen or more pages of a brief to bringing before this court the constitutionally proper test of obscenity, but without this laborious presentation this court cannot comprehend what the United States Supreme Court has said is the law of this land. My apologies, but here we go!

In this cause, the question of whether these particular works are obscene involves not really an issue of fact but a question of constitutional judgment of the most sensitive kind. The appellate courts must rule on this matter so that the parties below may procede with confidence. If an appellate court were to rely upon and be bound by the

opinion of the trier of facts as to the obscenity of the publication it would be abdicating its role as an arbiter of constitutional issues. The appellate courts must determine the law of the case for the sake of the consistent interpretation of the statutes and uniform determination of whether a particular matter is obscene. The opinion of the Supreme Court in [fol. 463] *Jacobellis vs. Ohio*, 378 U.S. 184, in discussing the issue of the fact versus law judgment stated pinpointedly as follows:

"... We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence'. The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law."

Also see *Kingsley Int'l Pictures Corp. vs. Regents*, 360 U.S. 634, 708, 79 S. Ct. 1362 (separate opinion).

Even as early as 1931 the federal courts recognized that the appellate courts must determine as a matter of law in the first instance whether or not a particular publication alleged to be obscene falls in any sense within the definition of that

word. *U.S. vs. One Obscene Book entitled Married Love*, 48 F.2d 821 (1931). In *U.S.A. vs. A Motion Picture Film Entitled, "I am Curious-Yellow"*, 404 F.2d 196 (1968), the Second Circuit says as follows:

"However, in our view obscenity *vel non* is not an issue of fact with respect to which the jury's finding has its usual conclusive effect. It is rather an issue of Constitutional law that must eventually be decided by the appellate court . . ."

There is substantial authority to support the proposition that matters are not obscene unless in fact they depict sexual activity, and in that case they are called "hard-core" pornography, and in that case can be suppressed. "Hard-core" pornography is readily [fol. 464] identifiable and requires no sophisticated formula to appraise the viewer of its nature. It is well known by the outrage that it inspires in the viewers mind, clearly if you can see sexual activity whether it is genital-genital, oral-genital, oral-anal, or any other possible combination is very easy to determine. It has in fact an objective application, the obvious advantage of the "hard-core" pornography test is that it simply accepts as a matter of law a national assumption that a certain category of material may be proscribed because it violates minimum national standards by being too foul or revolting. Absent any redeeming social value it is proscribable. The test therefore permits the Court to view the material objectively and decide in advance of trial whether a publication's distribution is permissible. It avoids subjective evaluation of the challenged material on the basis of its possible prurient appeal to some hypothetical person. The obvious advantage of the "hard-core" pornography test is that it directs the Court's attention to the material itself and avoids the antiquated and

ultra-subjective appeal formula of the old *Roth-Alberts* test. This "hard-core" pornography test has been described as most clearly indicating what may be considered to be obscene because it does describe something that most judges and others will know when they see it and that leaves the smallest room for disagreement.

It appears that there should be a required procedure for a pretrial determination of a publication's legality and it seems to the writer that this procedure is now constitutionally mandated so that presumptively protected printed materials are not suppressed [fol. 465] for any longer than is absolutely necessary in order to determine its legitimacy.

The test advocated by the Supreme Court for determining obscenity *vel non* appears now to be limited to "hard-core" pornography, and this limitation facilitates the use of this pretrial constitutional law procedure.

In *State v. Voshart*, 159 NW 2d 1, p. 7, 39 Wis. 2d 419 (1968), the Supreme Court of Wisconsin stated:

"This 'hard-core pornography' test has been described as most clearly indicating what may be considered to be obscene because '... it does describe something that most judges and others will (know... when they see it)... and that leaves the smallest room for disagreement.'"

Donnenberg, et al vs. State, 1 Md. 232 A.2d 264 App. 591 (1967),

"Even assuming that to be hard-core pornography there must be illustrated incidents of sexual activity, normal or perverted, involving some 'act' to be

flagrant erotica and that the publication, taken as a whole, not only speaks for itself but screams for all to hear that it is obscene."

In a recent order and opinion of a Federal District Court Judge in the Eastern District of Wisconsin, dealing with a criminal obscenity, *U.S.A. Art Films International, Inc. et al*, No. 68 CR 104 case, the Court in ruling on the Defendant's Motion to Dismiss had this to say:

"Whether a particular work is obscene implies an issue of constitutional law. See *Jacobellis v. Ohio*, 378 U.S. 184 at pp. 198-190 (1964). If possible, the constitutional question must, therefore, be decided by the court when the motion is made and when it is made prior to trial, a pre-trial determination must be made, in order that materials protected by the First Amendment are not subjected to a legal proceeding for any longer than necessary. On this basis, this court believes that a motion to dismiss on the grounds that the materials are not obscene as a matter of law, the materials must be reviewed and the obscenity test applied at a hearing on the motion."

[fol. 466]

The Supreme Court itself has authorized this approach in its *per curiam* opinion in *Redrup v. New York*, 386 U.S. 767, and the historical application thereof in reversing summarily multiple convictions or findings of State and Federal Trial Courts and Appellate Courts of obscenity of multiple classes of materials, as will be more fully set out herein.

It seems perfectly clear that Supreme Court of the United States in offering a workable solution for the Courts in obscenity litigation, civil or criminal, *in rem* or *in personam* has restricted the determination of obscenity *vel non* to those materials depicting a sexual activity.

Redrup v. New York, supra, states the controlling legal principles. After outlining the diverse views of the individual justices, the Court held that "whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand." *Redrup, supra* at 771, recites as follows:

(1) "Two members of the Court have consistently adhered to the view that a state is utterly without power to suppress, control, or punish the distribution of any writings or pictures upon the ground of their 'obscenity'. A third has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material. Others have subscribed to a not dissimilar standard, (emphasis supplied) holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless '(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it * (386 US 771) affronts contemporary community standards relating to the description or representation of sexual matters; and, (c) the material is utterly without redeeming social value, emphasizing that the three elements must coalesce' and that no such material can be 'proscribed unless it is found to be utterly without [fol. 467] redeeming social value.'" *Memoirs v. Massachusetts*, 383 U.S. 413, 418-419, 16 L ed 2d L. 5, 6, 86 S.Ct 975. Another Justice has not viewed the "social value" element as an independent factor in the judgment of obscenity. *Id.*, at 460-462, 16 L ed 2d at 29, 30 (dissenting opinion).

The Court confirmed its position historically by granting and reversing summarily each of the following twenty-two cases since ruling in *Redrup v. New York, supra*, on May 8, 1967.

1. *Keney v. New York*, 388 U.S. 440, 87 S. Ct. 2091 (1967). Books found not constitutionally obscene: *Sin Servants Lust School* and *Lust Web*.
2. *Friedman v. New York*, 388 U.S. 441, 87 S.Ct. 2091 (1967). Booklets found not to be constitutionally obscene: *Bondage Boarding School*; *Bound and Spanked*; *English Spanking School*; *Sweeter Gwen*; *Travelling Saleslady Gets Spanked*; *Bound to, Please*; *Heat Ways*; *Bizarre Summer Rivalry*; *An Escape Into Bondage*, Book No. 2.
3. *Ratner v. California*, 388 U.S. 442 (1967). Film *Honey Bee* found not constitutionally obscene.
4. *Aday v. United States*, 388 U.S. 447 (1967). Book, *Sex Life of a Cop*, found not constitutionally obscene. In Lower Court see 357 F.2d 855 (1966), 228 F. Supp 171.
5. *Books, Inc. vs. United States*, 388 U.S. 449 (1967) Book *Lust Job* found not constitutionally obscene. In Lower Court see 358 F.2d 935.
6. *Corinth Publications, Inc. vs. Wesberry*, 388 U.S. 448, (1967) Book *Sin Whisper* found not constitutionally obscene. In Lower Court see 146 S.E. 2d 764.
7. *Advansino v. New York*, 388 U.S. 446 (1967) Packets of female nude photographs and book *Promenade Bondage* found not constitutionally obscene.
8. *Cobert v. New York*, 388 U.S. 443 (1967) Films *Jane Palmer No. 2*, *N. Jordon* and *Jayne Tracy* found not

constitutionally obscene. In Lower Court see 207 N.E. 2d 619.

9. *Sheperd v. New York*, 388 U.S. 444 (1967) Sets of nude female photographs found not constitutionally obscene.

[fol. 468]

10. *Quantity of Books vs. Kansas*, 388 U.S. 452 (1967) Books found not constitutionally obscene: *Sin Hooked*, *Bayou Sinners*, *Lust Hungry*, *Shame Shop*, *Fleshpot*, *Sinner Seance*, *Passion Priestess*, *Penthouse Pagans*, *Shame Market*, *Sin Warden* and *Flesh Avenger*. In Lower Court see 416 P.2d 703.
11. *Schackman vs. California*, 388 U.S. 454 (1967) Girlie pictures in coin-operated peep shows: D-15, O-12, O-7, B-1 and B-19 found not to be constitutionally obscene.
12. *Central Magazine Sales v. U.S.*, 389 U.S. 50 (1967) Magazines found not constitutionally obscene: *Exclusive*, *International Nudist Sun*, No. 16, and *Review International* No. 6. In Lower Court see 373 F.2d 633 (1967), 253 F. Supp. 485, (1966).
13. *Potomac News Co. vs. United States*, 389 U.S. 47 (1967) Magazines *Hellenic Sun*, Number 2 found not constitutionally obscene. In Lower Court see 373 F.2d 635 (1967), 253 F. Supp. 498 (1966).
14. *Chance vs. California*, 88 S. Ct. 264 (1967) Sets of nude photographs found not constitutionally obscene.

15. *I. M. Amusement Corporation vs. Ohio*, 389 U.S. 573 (1968) Film strip of two females acting like Lesbians and fondling one another found not constitutionally obscene. In Lower Court see 266 N.E. 2d 567.
16. *Robert-Arthur Management Corp. vs. State of Tennessee*, 388 U.S. 578 (1968) Movie of women caressing one another and acting as Lesbians found not constitutionally obscene. In Lower Court see 414 S.W. 2d 638.
17. *Henry vs. State of Louisiana*, 20 L. ed 1343 (1968) Eleven "girlie" magazines found not to be unconstitutionally obscene. In Lower Court see 198 So. 2d 889.
18. *Felton vs. City of Pensacola*, 390 U.S. 340 (1968) Male and female nude magazines found not to be constitutionally obscene. In Lower Court see 200 So. 2d 842.
19. *Mazes vs. Ohio*, 388 U.S. 453 (1967) "Girlie" magazines found not to be unconstitutionally obscene. In Lower Court see 218 N.E. 2d 725.

[fol. 469]

20. *Conner vs. City of Hammond*, 389 U.S. 431 (1967) "Girlie" magazines found not to be unconstitutionally obscene. In Lower Court see 196 So. 2d 276.
21. *Carlos vs. New York*, — U.S. — December 8, 1969. Two girlie magazines found not to be constitutionally obscene.

22. *Cain vs. Kentucky*, — U.S. — March 23, 1970.

A movie featuring simulated intercourse, nudity, and focus on foreplay of man woman held not to be obscene in the constitutional sense. In Lower Court see 437 S.W. 2d 769.

In this latest case decided by the Supreme Court of the United States by a 6 to 2 decision, the conviction of Cain was reversed based on *Redrup vs. New York, Supra*. The Kentucky appellate Court described the movie which the Supreme Court just ruled not obscene, in the following language in its reported opinion at 437 S.W. 2d 769, at page 774:

"We have viewed the evidence presented to the trial jury. The film is a 90-minute motion picture devoted almost entirely to the sexual encounters of one female by the name of Eve. It opens by showing Eve nude in her bedchamber engaging in the practice of caressing herself in a suggestive manner to the accompaniment of her father's violin. She progresses to a passionate love scene with her fiance, Svend, while lying fully clothed on top of him in her bedchamber. This act is performed with the camera full on the subject. From this the film proceeds to the act of intercourse with a married patient, Heinz Goertzen, in a hospital room where Eve is employed as a nurse. This act she solicits with the use of nude photographs taken of her by her fiance for this specific purpose. During the course of the sequence, the camera focuses upon the head of the male partner and the stomach area of the female partner. It shows the male partner caressing with kisses the area between the navel and the pubic hair. The camera then shifts during the act of intercourse to the face of the female subject. After this, the film follows the life of Eve from one act of sexual intercourse to

another until it has been accomplished some five times, all with different partners. Each time the act is as vividly portrayed upon the screen as was the scene in the hospital room. In one instance the sex act is in the form of rape. The film represents nothing more than a biography of sexuality. There is no story told in the film; it is [fol. 470] nothing more than repetitious episodes of nymphomania. Nudity is exposed in such manner that if the subject had posed in person instead of on film she would have immediately been arrested for indecent exposure. We are of the opinion that the jury not only had sufficient evidence before it upon which to base its verdict but that this evidence was overwhelming."

The Supreme Court of the United States ruled a publication of nude photographs with a focus on the pubic area featuring poses of female nudes in lewd attitudes and positions, including legs widespread to reveal the genital area in its entirety, as being not obscene as a matter of law and comparable with simple "Girlie" magazines. *Central Magazine Sales, Ltd. vs. U.S.A., supra*, reversing 373 F.2d 633 and 253 F. Supp. 485. For the 4th Circuit, Judge Haynesworth said:

"We agree, also, that EXCLUSIVE is obscene." "EXCLUSIVE is a collection of photographs of young women, in most of them, long stockings and garter belts are employed to frame the pubic area and focus attention upon it. A suggestion of masochism is sought by the use of many of the pictures of chains binding the models' wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: The model clad only in a framing black garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide." (Emphasis supplied)

"We agree with the District Court that these apparently unretouched pictures of young women, posed as they are, are patently offensive and that the magazine **EXCLUSIVE** is obscene."

The decision of the Circuit Court of Appeals was appealed on a petition for a Writ of Certiorari to the Supreme Court of the United States on October 23, 1967, the Court reported out as follows:

"**PER CURIAM.** The Petition for a Writ of Certiorari is granted and the judgment of the United States Court of Appeals for the Fourth Circuit is reversed. *Redrup v. New York*, 386 U.S. 767."

[fol. 471] A footnote at that point in the decision directs the reader to an observation which states:

"Other cases which turned on findings of nonobscenity of this type (girlie) magazines include: *Central Magazines Sales, Ltd. vs. United States*, 389 U.S. 50...."

It is clear that the members of the Supreme Court see no difference between the classic "girlie" magazines such as *Spree*, *High Heels*, (*Austin vs. Kentucky*, 386 U.S. 767 (1967)), *Gent*, *Swank*, *Bachelor*, *Ace*, *Cavalcade*, *Gentleman* and *Sir*, (*Gent vs. Arkansas*, 386 U.S. 767 (1967)), *Escapade*, *Dude*, *Gent*, *Rogue*, *H.Q.*, *Cavalier*, and *Knight*) (*Conner vs. City of Hammond*, *supra*, (1967) and the magazine *Exclusive* (in Lower Court see *Central Magazine Sales, Ltd. vs. U.S.A.* *supra*) about which it was said by the United States District Court for the District of Maryland, "The pictures of the women in the magazine *Exclusive* are so elemental that the ordinary judge or juror should be able to recognize the nature of their appeal to the average man. (Prurient appeal)" (In Lower Court see *U.S.A. vs. 392 copies of a Magazine Entitled "Exclusive"*, *supra*. DC-MD 1966)

See also:

People vs. Billingsley et al, C. A. of Michigan No. 5544-46.

Grant vs. U.S. 380 F.2d 748 (1967)

U.S. vs. One Book Entitled Father Silas, 249 F. Supp. 911

Royal News Co. vs. Schultz, 230 F. Supp. 641 (1964)

The United States Court of Appeals for the Eighth Circuit, in *Luros vs. United States*, 389 F.2d 200, at P. 202, made essentially the same observation as the Supreme Court later did in *Ginsberg vs. N.Y.*, *supra*, to the effect that "girlie" magazines are not obscene when it reported:

[fol. 472] "... magazines consisting of pictures of scantily clad and nude models, generally posed in suggestive and provocative positions (called 'girly' magazines). Although described as 'sexually provocative', these are generally not within the proscription of the statute," (Sec. 1461 & 1462, Title 16 U.S.C.A.)

The Court in the *Luros* case went on to make this observation:

"In *Redrup vs. State of New York*, 386 U.S. 767, there is specific indication that a majority of the Supreme Court adopts standards, 'not dissimilar' to banning only 'hard-core' pornography. Subsequent application of *Redrup* gives no contraindication."

Recently retired Chief Justice Roger J. Taynor of the Supreme Court of California (now Visiting James Monroe Professor of Law at the University of Virginia), joined in the majority opinion of the Court which came to a similar conclusion in the case of *People v. Noroff*, 435 P.2d 479, 63 Cal. Rptr. 575 (1967), wherein it was stated at page 461:

"The graphic depiction of such sexual activity seems to be the distinguishing feature of the only materials which the United States Supreme Court has ever ruled obscene. The publications involved in *Ginzburg vs. United States*, 383 U.S. 462, contained descriptions and photographic essays dealing explicitly and dynamically with sexual relations; the court noted that the petitioners were guilty of 'animated sensual detail' to give the publication a salacious cast . . . the film central to the litigation in *Landau v. Fording*, 388 U.S. 456, explicitly and vividly revealed acts of 'masturbation,' oral copulation . . . sadism, masochism, and sex . . . such materials and no others, have been thought to constitute "hard-core" pornography. (See the dissenting opinion of Stewart, Jr. in *Ginzburg vs. U.S.*, *supra*, see also *Magrath, The Obscenity Cases: Grapes of Roth; The 1966 Supreme Court Review* 7, at 71.)"

In the body of the decision in *People vs. Noroff*, *supra*, the Court went on to say:

"... this court is bound, of course, by the decisions of the United States Supreme Court. That court has imposed its prohibitions only to the outer limits of the area of publications leaving to the public the task of voluntarily [fol. 473] casting out the offensive. That Court has held that the representation of the nude human form in a non-sexual context is not obscene. The Supreme Court has decided that the judiciary cannot engage in the task of placing legal fig leaves upon variegated presentations of the human figure. The court has told us that no matter how ugly or repulsive the presentation we are not to hold nudity absenting sexual activity to be obscene. In the material before us we find some of the poses of the subjects to be inexcusably repulsive, and we trust that a discerning public will discard and reject them. But the decisions of the United States Supreme Court tell us that the task of review lies not with us but with the public." (emphasis supplied)

To determine what it is that Justice Stewart has defined as "hard-core" pornography and about which *Redrup* reports that four members of the Court have adopted "not a dissimilar standard", we are referred to *Ginzburg vs. U.S.*, *supra*, where Justice Stewart undertakes to define "hard-core" pornography as follows:

"Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character"

The highest Appellate Court in the State of Ohio was led to remark in its opinion in the case of *State vs. J. L. Marshall News Co.*, 232 N.E. 2d 435 (1967) as follows:

"By absorbing Mr. Justice Stewart's limitations into its previous definitions of constitutionally proscribably obscenity, the Court has made clear that it is determined to close once and for all the Pandora's Box it opened in *Roth vs. United States*, 354 U.S. 467 which required all the Courts in the country to act as constitutional literary censors."

"*Redrup* holds that except under laws dealing specifically with juveniles, the state may not constitutionally proscribe any material other than hard-core pornography as described by Mr. Justice Stewart in *Ginzburg*."

The United States Court of Appeals for the Second Circuit in the case of *United States vs. Klaw*, 350 F.2d 155 (1965) at page 164, states:
[fol. 474]

"Thus, material is proscribable 'obscenity' or *hard-core pornography* if it has the requisite prurient appeal, and if it so exceeds customary candor as to be patently offensive, unless it has redeeming social importance." (emphasis supplied)

The United States Court of Appeals for the First Circuit in the case of *Excellent Publications, Inc. vs. United States*, 308 F.2d 362, citing *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, stated:

"... front view group photographs of naked men, women and children with exposure of the genital area of both sexes are not obscene as a matter of law ... in short the pictures simply are not the kind of 'hard-core pornography' within reach of the statute construed in the light of the constitutional guarantee of freedom of the press." (emphasis supplied).

In one of the opinions in *Manual Enterprises v. Day*, 370 U.S. 478 (1962) at page 488 Justice Harlan wrote:

"At least one important state court and some argumentative commentators have considered *Roth* and subsequent cases to indicate that only 'hard-core' pornography can constitutionally be reached under this or similar state obscenity statutes."

The Wisconsin Supreme Court on June 7, 1968, in *States v. Voshart*, *supra*, observed:

"There appears to be two such definitions that have been given Supreme Court approval ... the alternate definition defines 'obscene' as meaning 'hard-core' pornography."

The United States Court of Appeals for the Ninth Circuit in *Culbertson v. State of California*, 385 F.2d 209 (1967) views the Federal Standard of obscenity as embracing only "hard-core" pornography when it reports:

"We have examined the photographs in question. Each depicts four scantily clad women whose poses might be provocative to some. The pictures are not artistic, but we are thoroughly convinced that they are not 'hard-core' pornography and that they do not,

in their expression, go substantially beyond customary limits of candor'. *Redrup v. New York, supra.*"

[fol. 475] It is clear that when the United States District Court for the Central District of California considered the importance of the 65 multiple issue numbers of female "girlie" magazines and finding the same not to be obscene relying on *Central Magazine Sales, Ltd. vs. U.S.A., supra*, which in turn relied on *Redrup vs. N.Y.*, they were viewing the Federal Standards as required the proscription only of "hard core" pornography, in an obscenity *vel non* determination. In Lower Court see *U.S.A. v. 80 Cartons, etc. Civil No. 68-430-IH (4-30-68)* *U.S.A. v. Three (3) Packages, etc. Civil No. 68-25-F (2-20-68)*; both cases from U.S.D.C. California.

In *G. P. Putnam's Sons vs. Calissi*, 235 A.2d 833 (1967) the State Supreme Court for New Jersey observed:

"Under the standards enunciated by the United States Supreme Court, it must be concluded that publishing, selling or distributing the book in question is protected from governmental suppression by the First and Fourteenth Amendments. *Redrup vs. New York, supra.*"

The United States District Court for the District of Maryland in a decision joined in by all members of the bench in *U. S. vs. 4,400 Copies of Magazines, etc.* 276 F. Supp. 902, reported:

"It appears, therefore, that persons to whom the magazines will be offered commercially, and the methods by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the First Amendment."

A Two (2) Judge Court of the United States District Court for the District of Maryland in *U.S.A. vs. 127, 295*

copies of Magazines, et al, 295 F. Supp. 1186 (1968), in releasing from seizure approximately 82 different issues of magazines as not being obscene in the constitutional sense stated:

[fol. 476] "The magazines in the present importation appeal more blantly to the prurient interest of the average man or boy, and go further beyond the prevailing standards of candor. They have no social value. They are clearly obscene in the ordinary sense of the word. This court has no doubt that they would be considered obscene by almost any jury and by almost any judge not bound by the present interpretation of the First Amendment by the Supreme Court. In a few of the magazines Lesbian activities are suggested, but none of them contains any pictures of sexual intercourse." (emphasis supplied)

"But the duty of the inferior federal courts is to apply as best we can, the standards the Supreme Court has declared with respect to obscenity... this court is of the opinion that if the magazines involved in this case are sold to juveniles or offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them or if they are offered for sale in a manner which amounts to pandering within the principles states in *Ginsburg vs. United States*... they would not be entitled to the protection of the First Amendment."

Publications photographically depicting the female body either partially clothed or with no clothing and static or sexually provocative with an emphasis on the pubic or genital area are "girlie" magazines and clearly non obscene for adults.

The magazines before the Court in the case at bar not heretofore adjudicated are comparable to other books and magazines that have been ruled "not obscene" in Federal Courts and as such are entitled to the protection of the First Amendment of the Constitution of the United States.

Books involving suggested Lesbian activity but without pictures of sexual congress were found not to be obscene in a declaratory judgment case of *Poulos v. Rucker*, 388 F. Supp. 305 (1968) "Gay Gay, A Go-Go," "dolls, A Go-Go," "Lesbianiana" and "Seize". Other publications declared not obscene in that case [fol. 477] include "Triangle," "Stud," "Warped Desire," "Exotic Sentiment," "Nudist Times," "Nudist Connossier" and "Sun and Sports."

In a case decided on January 24, 1969, in the Criminal Court of New York City by written opinion of Judge Ringle, in *People of the State of New York v. Emilio Stabile, et al*, the Court ruled that the publications "Daisy," "Good Gals," "Bunny," "Sissy," "Countess," "Exciting" and "Cover Girl" containing photographs of females in various poses and stages of nudity, some provocative prominently displaying the vagina aperture, were not obscene as a matter of law and protected by the First Amendment.

The Court relied upon *Redrup v. New York*, supra, U.S. v. 127,295 copies of Magazines, supra, and U.S. v. 4,400 Copies of Magazines, supra.

In confirmation of the concept that suggested sexual activity, and in the case at bar, in the magazines, is not without the First Amendment, we look to the case of *Schackman v. Arneberg*, 258 F. Supp. 983 (1966), previously cited herein, where certain pictures in coin operated peep shows, O-12, O-7, and D-15 were described by the trial court as follows:

1. As to O-12

"The film consists of a female model clothed in a white blouse open in the front, a half-bra which exposes the upper half of the breasts including the nipples and a pair of white capri pants (which are soon discarded) under which the model wears a pair of sheer panties through which the pubic hair and region are clearly visible. The film consists of the

model moving and undulating upon a bed, moving her hands, lips and torso all clearly indicative of engaging in sexual activity, including simulated intercourse and invitations to engage in intercourse."

[fol. 478]

"There is no music, sound, story line or dancing other than exaggerated body movements. On at least three occasions, the female by lip articulation is observed to state, "fuck you," "fuck me." The dominant theme of the film taken as a whole, obviously is designed to appeal to the prurient interest in sex of the viewer and is patently offensive in that the focus of the camera returns again and again to the genital and rectal area clearly showing the pubic hair and the outline of the external parts of the female genital area."

2. 0-7:

"The model wears a garter belt and sheer transparent panties through which the pubic hair and external parts of the genitalia are clearly visible. For at least one half of the film, the breasts are completely exposed. At one time the model pulls her panties down so that the pubic hair is exposed to view. Again, the focus of the camera is emphasized on the pubic and rectal region and the model continuously uses her tongue and mouth to simulate a desire or enjoyment of, acts of a sexual nature. The dominant prurient interest in sex of the viewer and is patently offensive in its emphasis of the genital and rectal areas, clearly showing the pubic hair and external parts of the female genital area."

3. D-15 was held to be substantially the same in character and quality as the films 0-12 and 0-7.

In the opinion it was further stated:

"The Court concludes as a matter of law that the exhibits and each of them are clearly unequivocally and incontrovertibly obscene and pornographic in the

hard core sense because they come within the reasonable purview and ambit of both the Federal judicial definition of obscenity and hard core pornography."

The Supreme Court of the United States found the above described films not to be obscene in the constitutional sense, thus in total disagreement with the findings of the learned Federal District Court trial judge. See: *Schackman v. California*, 388 U.S. 454 (1967).

The Supreme Court of the Commonwealth of Virginia recently had before it a case involving "girlie" magazines, and in an opinion [fol. 479] by Chief Justice Eggleston, *House v. Commonwealth of Virginia*, 169 S.E.2d 572, the Court stated in pertinent part as follows:

"From an examination of the three magazines here involved, in the light of the opinion (*Jacobellis v. State of Ohio*, supra) and the other rules laid down by the Supreme Court of the United States, our conclusion is that it has not been shown beyond a reasonable doubt that these publications are obscene.

"Without attempting to describe the magazines, or the particular scenes depicted there which the witnesses for the Commonwealth found offensive, it is sufficient to say that they are what is 'commonly called girlie' magazines. They carry pictures of nude and partly clothed men and women. The leading article in one relates to the experiences of a call-girl prostitute. But nudity is not necessarily obscenity, as the courts have frequently pointed out. *Excellent Publications, Inc. v. United States*, 309 F.2d 362 (1st Cir. 1962); *People v. Biocio*, 80 111 App. 2d 65 224 N.E.2d (572) (1967).

"In *Redrup v. State of New York*; *Austin v. State of Kentucky*, and *Gent v. State of Arkansas*, 386 U.S. 767, it was the majority opinion, expressed in a percuriam opinion, that girlie-type magazines similar to those with which we are here concerned were not obscene. Certainly, in the light of that opinion, it cannot be said that it has been shown beyond a reasonable doubt that the magazines herein in question are obscene and beyond the area of constitutionally protected expressions."

The Supreme Court of the State of Oregon recently upheld an obscenity conviction against Harold G. Childs for a book entitled, *Lesbian Roommate*, *State vs. Childs*, 447 P.2d 204, but the United States District Court for the District of Oregon reversed in *Childs vs. Oregon*, 300 F. Supp. 649 (1969), and in doing so stated in pertinent part as follows:

"The Oregon Supreme Court held that the books 'obvious purpose***is to stimulate the reader sexually.' 447 P.2d at 306. 'The entire book,' the Court said, 'is for the purpose of inciting lascivious thoughts and arousing lustful desires.' 447 P.2d at 307. This does not satisfy [fol. 480] the requirement of appeal to prurient interest. A prurient interest is a 'shameful or morbid interest in nudity, sex or excretion.' *Roth vs. United States*, 354 U.S. 476, No. 20."

In the case of *People of the State of California vs. Rosakos*, 74 Cal. Rep. 34, (1968) the appellate Court stated:

"The pictures depicted a semi-nude female posing in such a manner as to show her breasts and vaginal area. These pictures would seem to be quite similar to those described in *People vs. Noroff*, supra, where at page 794, 63 Cal. Rptr. at page 577, 443 P.2d at page 481, the court says: 'The publication admittedly

makes no effort to conceal either male or female genitals, and several of the poses seem contrived to preserve genital exposure at the expense of aesthetic considerations."***Having thus found that the pictures in question are not obscene per se can they be made so by the seller's pitch and comeon as hereinabove related? We hold they cannot. The seller's statement certainly cannot make that which is not obscene, obscene."

See also, *In. Re. Panchot*, 73 Cal. Rptr. 689 (1968) where the Supreme Court of California stated:

"The substantive activity condemned in this case consisted of selling four packets of photographs depicting nude females posing singly. In these crude photographs, the subjects assume various poses singly, which emphasize various parts of the body. None of the poses, however, depicts any form of sexual activity."

Footnote 5 in this case states:

"Graphic depiction of sexual activity is the distinguishing feature of the only materials which the United States Supreme Court has ruled to be obscene."

With respect to several pocket novels entitled, *Pleasure and Follies*, and *Les Enfants Terribles*, found by a criminal court in Michigan to be obscene, the State of Michigan Court of Appeals in a decision rendered October 30, 1969, entitled *People of the State of Michigan vs. Billingsley, et al* No. 554-46 states in pertinent part as follows:

[fol. 481] "The defendants' main contention on appeal is that the 2" books are not obscene in the constitutional sense. The phrase 'obscene in the constitutional sense' was coined by the United States Supreme Court. It serves both to focus attention on the constitutional issue involved when the State seeks

to suppress speech and to remind us of the paramount role of the United States Supreme Court in expounding the law of obscenity. The parties are in agreement that, in deciding whether these books, clearly obscene in the ordinary sense in which the words are used, are obscene in the constitutional sense, we are obliged to make a judgment independent of the jury's verdict.

"The 2 books are sexual diaries, i.e., autobiographical accounts almost exclusively of sexual incidents in the life of the protagonist. The descriptions primarily concern normal heterosexual activity. There are, however, many descriptions of more exotic heterosexual and, in 1 of the 2 books, of homosexual activity. The descriptions of particular sexual encounters are often protracted, repetitious and fanciful.

"The Court's most recent statement is in its much discussed Redrup opinion which held that various magazines and the books *Lust Pool* and *Shame Agent* were protected by the First and Fourteenth Amendments from State suppression. *Redrup vs. New York* (1967) 386 U.S. 767, (87 S Ct 1414, 18 L Ed 2d 515. The opinion of the Court (signed by 7 justices) repeated, but declined to rest decision solely on the Roth-Memoirs test; it adverted to the opinions of the justices who regard that test as too narrow a view of the First Amendment and concluded with the statement: 'Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand.' The Redrup opinion emphasized that no claim had been made that 'the statute in question reflected a specific and limited state concern for juveniles,' and that there had not been 'any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it,' and which the Court found significant in *Ginsburg vs. United States*."

"The United States Court of Appeals for the Eighth Circuit has observed that in *Redrup* 'there is specific indication that a majority of the Supreme Court adopts standards 'not dissimilar' to banning only 'hard-core' [fol. 482] pornography. Subsequent application of *Redrup* gives no contraindication.'

"On the authority of *Redrup* the United States Supreme Court has reversed 19 decisions of lower Federal and State courts. Some of these concerned motion pictures, other magazines and still others, books. The following books have been held not obscene:

Sex Life of a Cop. *Aday vs. United States* (1967) 388 U.S. 447 (87 S Ct 2095, 18 L Ed 2d 1309).

Orgy Club. *Mazes vs. Ohio* (1967), 388 U.S. 453 (87 S Ct 2098, 18 L Ed 2d 1311).

Sin Hooked, Bayou Sinners, Lust Hungry, Shame Shop, Fleshpot, Sinners Seance, Passion Priestess, Penthouse Pagans, Shame Market, Sin Warden, Flesh Avenger. *A Quantity of Books vs. Kansas* (1967), 388 U.S. 452 (87 S Ct 2104, 18 L Ed 2d 1314).

Sin Whisper. *Corinth Publications, Inc. vs. Westberry* (1967), 388 U.S. 448 (87 S Ct 2096, 18 L Ed 2d 1310), Post-*Redrup* but *Redrup* was not relied on in the Supreme Court opinion.

Pleasure was my Business. *Tralines vs. Gerstein* (1964), 378 U.S. 576 (84 S Ct 1903, 12 L Ed 2d 1033), pre-*Redrup*.

"Other courts have held that similar publications are entitled to constitutional protection.

"We have read the 2 books involved in this case, and compared them with some of the books held to be not obscene. Where we have not been able to obtain

a book, we have relied on the description of its contents in the opinion of the court which was reversed by the United States Supreme Court.

"All these sexual diaries, those before us and those that other courts, including the United States Supreme Court, have held to be not obscene, are fundamentally the same. They are all designed to appeal to the sexual appetite of the reader. Their overall format is identical. The protagonist proceeds insatiably from one sexual incident to another to the exclusion of any other interest. The intimate descriptions of herculean performances portrayed in the diaries [fol. 483] before us are similar in concept to descriptions of sexual incidents in several of the books which we examined held by the United States Supreme Court to be protected by the First and Fourteenth Amendments.

"We have considered the fact that the 2 books before us liberally use vulgar words and are written in an unskilled and coarse style. The images produced in the theatre of the mind by the sexual diaries before us are, however, precisely the same as the mental images portrayed in the books found to be entitled to constitutional protection. The fact that considerably more profanity is used in the diaries before us to convey the same fundamental ideas, thoughts and images cannot be the basis of a meaningful, workable, constitutional distinction. The constitutional right to communicate ideas would be unduly limited if the State could take upon itself the right to prohibit the use of certain words, however offensive and odious they may be, to communicate those ideas. The State cannot constitutionally differentiate between one sexual diary and another, both communicating the same thoughts and images, according to the delicacy of the words chosen to convey those thoughts and images. The exercise of the constitutional right does not depend on the author's euphemistic skill."

After stating its conclusions accordingly, the Michigan Court of Appeals reversed the jury verdict of guilty.

In January 1968, the United States District Court for the Southern District of California, by its Chief Judge Solomon, in a case styled *United States vs. Baranov*, 293 F. Supp. 610, denied a Motion for New Trial after a jury found the individuals guilty of violation of the criminal obscenity statutes. The publications condemned by the Court include:

- I. "Forceful Wife Binds Man in Female Clothes."
"Revengeful Spanking Bondage Predicament."

(Both containing pictures of men and women forcibly bound and gagged.)

- II. Studies in Corporal Punishment Series (Spanked in Bed; Domination by the Whip; Teenage Thrashing, The Whipping Chorus and Teenage Spanking).

(All of the foregoing books contain crudely drawn sketches of nude or almost nude young women who are being beaten by a man or a woman either by [fol. 484] hand or with a strap or whip. Most of them contain advertisements for similar books, magazines or records which may be purchased from the defendants' company.)

- III. "The Lesbian Quarterly"

(Contains 60 pages, six of which are full-page pictures of two nude young women. Another full-page picture is of one nude girl. Most of the pictures are front or three-quarter views.)

- IV. "Hellenic Sun"

(32 pages of which 20 pages contain photographs of nude men with their genitals prominently displayed.

In some of the photographs the pelvis of the model is extended forward in order to emphasize the genitals.)

The Judge stated in reference to his ruling regarding the magazines as follows:

"I was well aware of the heavy burden of the Judge in the case of this kind, and before I submitted the case to the jury, I made the constitutional determination that the material was obscene. I found that it was patently offensive, that it was designed to and did appeal to the particular deviant group, and that it was utterly without social value. I also found that the advertising matter had the leer of the sensualist and was deliberately directed to the erotic interest of potential customers. Lastly, I found that the defendants knew that the material was obscene at the time it was mailed."

On November 28, 1969, the United States Court of Appeals for the Ninth Circuit, in *United States vs. Baranov*, 418 F 2d 1051 (1969) reversed the convictions and stated in pertinent part:

"The matter found to be obscene consisted for the most part of printed booklets containing photographs and illustrations pertaining to nudity, masochism, flagellation, and lesbianism, together with accompanying text material.

"Defendants primary argument on this appeal is that the materials in question are not obscene or unlawful when considered against proper constitutional standards. This contention involves the Free Speech [fol. 485] Guaranty of the First Amendment to the United States Constitution.

"We find very little evidence of pandering in the record; certainly nothing approaching the evidence of

that kind which tipped the scales in favor of conviction in *Ginzburg*. We are therefore compelled to conclude that in view of the Government's concessions and stipulation at the outset of the trial, the record before us does not support a jury determination in this case that the materials here in question are obscene in the constitutional sense."

In 1968, the Congress of the United States in Public Law 90-100, established an advisory commission to study obscenity and the laws, and make recommendations. This commission is called the *Commission on Obscenity and Pornography*. It has recently issued its progress report, and the legal panel after reviewing recent case law regarding obscenity and pornography for guidelines concerning permissible legislative action reported on page 3:

"Constitutional precedents suggest three primary directions for effective legislative action to control erotic materials: 1) Statutes with specific concern for juveniles; 2) Statutes dealing with assaults upon individual privacy and offensive public displays; 3) Statutes prohibiting pandering."

CONCLUSION

Mr. Justice Stewart stated in his concurring opinion in *Ginsberg vs. New York*, *supra*:

"The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a 'free trade in ideas.' To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose."

[fol. 486] On the basis of the cases herein cited and represented to the Court in the premises as summarizing the existing law on the issue of obscenity before the Court, ~~obviously viewed in the light most favorable to the State of~~ Florida, appellants respectfully request that the Court reverse the lower Court's finding of obscenity.

[fol. 487]

II. THE COURT ERRED IN CREATING JUDICIALLY AN UNLAWFUL PRIOR RESTRAINT, JUDICIALLY SEIZING BY INJUNCTION WHERE THERE HAD BEEN NO ADVERSARY HEARING DECLARING THE 19 MATERIALS OBSCENE, NOR THE THOUSANDS OF PUBLICATIONS LOCATED WITHIN THE STORE BUILDING LOCATED AT 19 HARRISON AVENUE, PANAMA CITY, FLORIDA.

There can be no question but that an adversary hearing and a declaration of obscenity is constitutionally required before a suppression of publications can occur, whether that suppression be by a sheriff's seizure, a prosecutor's subpoena, or a judge's arbitrary imposition by injunctive order amounting to a judicial seizure.

Requiring the presentation of materials by subpoena duces tecum is a prior restraint. Not returning publications placed before the court under protest is a prior restraint, where there has been no declaration of obscenity. Closing down the store is a prior restraint because there can be no circulation of presumptively protected materials therein not declared obscene. The judiciary as well as the executive arm of the State of Florida can accomplish the same prior restraint through a different avenue or approach. Judge Fitzpatrick's prior restraint is no different than a sheriff's massive seizure. Both acts accomplish the same purpose; namely total collapse of circulation of presumptively protected material. My point to be presented here is that an *adversary hearing is constitutionally required prior to seizure of any printed materials.*

It is conceded that the *First Amendment* to the *Constitution of the United States* relating to liberty of speech and of the press is not so absolute so as to preclude punishment by the State [fol. 48] or the Federal Government of obscene speech. *Roth vs. U.S.A.*, 354 U.S. 476 (1957), "We hold that obscenity is not within the area of constitutionally protected speech or press."

The Supreme Court in the *Roth* case (*supra*) went on to state:

"It is, therefore, vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to Prurient interest."

In *Bantam Books, Inc. vs. Sullivan*, 372 U.S. 58 (1963), it was confirmed "the constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication. (*Lovell vs. Griffin*, 303 U.S. 444)" It has been variously stated in other cases decided by this Court that:

"the right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin vs. Struthers*, 319 U.S. 141) *Griswald vs. Connecticut*, 381 U.S. 479."

In *Bantam Books vs. Sullivan*, *supra*, the Court went on to state:

"any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity . . ."

In *Speiser vs. Randall*, 357 U.S. 513 (1958), the Court stated:

"the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is

finally drawn. The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . ."

In *Marcus vs. Search Warrant*, 367 U.S. 717 (1961), it was stated:

"the use by Government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. Historically the struggle for freedom of press in England was bound up with the issue of the scope of the search and seizure power . . . the question here is whether the use by Missouri in this case of search and seizure power to suppress obscenity publications involved abuses inimical to protected expression . . . for the use of [fol. 489] these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected material . . . we believe that Missouri's procedures as applied in this case lacked the safeguards which due process determines to assure non-obscene material the constitutional protection to which it is entitled . . . they (police officers) were provided with no guide to the exercise of informed discretion because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity."

Against the background reported in *Marcus vs. Search Warrant*, *supra*, the Court went on to say:

"Kingsley Books does not support the proposition that the state may impose the extensive restraints imposed here on the distribution of these publications prior to an *adversary proceeding on the issue of obscenity* (emphasis supplied) irrespective of whether or not the material is legally obscene."

The Court then criticized the prior restraint by stating:

"there is no doubt that an effective restraint — indeed the most effective restraint possible was imposed prior to the hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the news stands and the premises of the wholesale distributor . . . the public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to out-wit the police by obtaining and selling other copies before they in turn could be seized . . . a distributor may have every reason to believe that a publication is constitutionally protected and will be so held after a judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seizes from him . . . mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression."

The next time a case regarding a search warrant in matters relating to obscenity came before the Supreme Court was in the case *A Quantity of Books vs. State of Kansas*, 378 U.S. 205. In *Books*, the State Court Judge held a 45 minute ex parte hearing in which he scrutinized the books and then issued the warrant. The Supreme [fol. 490] Court reversed saying:

"We conclude that the procedures followed in issuing the warrant for the seizure of the books and authorizing their impounding pending the hearing were constitutionally insufficient because they did not adequately safeguard against the suppression of non-obscene books."

The Court further states:

" . . . since P-K was not afforded a hearing on the question of obscenity even with the seven novels

before the warrant was issued the procedure was likewise constitutionally deficient."

The Supreme Court so ruled above even though it assumed for the sake of argument that the publications were obscene under the law.

In the case of *Metzger vs. Rarcy*, 393 F.2d 202 (CA 7-1968) the Senior Judge writing for the Court stated:

"We feel that we are held by the opinion of the Supreme Court in *Books*... the lesson of *Books* is that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. Such a seizure violated the First Amendment to the Constitution of the United States, and is a prior restraint condemned by the Supreme Court." (Emphasis supplied)

Recently a United States District Court in Montgomery, Alabama, had occasion to consider the question of "prior restraint" and the lack of an adversary proceeding in a matter styled *Poulos vs. Rucker*, 288 F. Supp 305 (1968) wherein Chief Judge Johnson stated:

"Detective Hammonds procured a warrant for plaintiff's arrest. No titles were specified in the warrant... at no time were any materials examined by a judicial official or any other attorney. Nor did the defendants solicit or receive any legal advice concerning criteria for distinguishing the obscene from the constitutionally protected. Defendant Hammonds stated that he was guided exclusively by the language of the city ordinance...

[fol. 491] "The Supreme Court has spelled out rather clearly what procedures must be followed. In *Marcus* the evil struck down was the broad discretion given police officials to determine the character of the publications. The danger of such discretion is well

illustrated by the case at bar... it suggests no disrespect for competent police officers to insist that in this sensitive area decisions be made according to a more rigorous standard employed by more expertly trained hands.

"The question of the necessity of a preliminary hearing of adversary quality, not reached in *Marcus*, was dealt with in *A Quantity of Books vs. Kansas*, 378 U.S. 205 (1964), the Court holding:

'It is our view that since the warrant here authorized the sheriff to seize all copies of the specified titles, and since P-K was not afforded a hearing on the question of the obscenity, even of the seven novels before the warrant issued, the procedure was likewise constitutionally deficient.' *Id.* at 210.

"This Court would agree with the summary of Judge Tyler:

'The common thread running through recent Supreme Court decisions on the seizure of allegedly obscene matter is that because the line between protected and unprotected speech is so difficult to draw, dissemination of a particular work should be completely undisturbed at least until an independent determination of obscenity is made by a judicial officer. Complete restraint on any work must await a final judicial determination of obscenity.' *United States vs. Brown*, 274 F. Supp. 561, 563 (S.D.N.Y.) (1967).

"The procedure adopted by defendants in this case is a classic prior restraint. *Bantam Books vs. Sullivan*, 372 U.S. 58, 70 (1963). *A Quantity of Copies of Books*, *supra* at 211.

"It is also clear that even in the absence of seizure threats of criminal prosecution by police officers or other administrative officials can constitute an all too effective prior restraint. *Bantam Books, Inc., supra* at 66-67. This is not to say, of course, that after a proper judicial determination of obscenity, the police may not 'negotiate' for removal of the books rather than institute a criminal proceeding."

[fol. 492] Likewise, in an opinion rendered by a Three Judge Panel, including His Honor, Circuit Judge Peck of the Fifth Circuit Court of Appeals, reported as *Cambist Films, Inc. vs. Tribell*, 293 F. Supp 407, 409 (E.D. - Ky, 1968) it was stated:

"Because the line between protected and unprotected speech, under the First Amendment, is so difficult to draw, and because First Amendment rights are of such fundamental importance to our system of government, the Constitution requires a procedure 'designed to focus searchingly on the question of obscenity' before speech can be regulated or suppressed. *Marcus vs. Search Warrants*, 367 U.S. 717, 732, 81 S. Ct. 1708, 1716, 6 L. Ed. 2d 1127. The dissemination of a particular work, which is alleged to be obscene, should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer, including an adversary hearing. *A Quantity of Copies of Books vs. Kansas*, 378 U.S. 205, 211, 84 S. Ct. 1723 12 L. Ed. 2d 809; *Metzger vs. Percy*, 7 Cir., 393 F. 2d 202, 204; *United States vs. Brown* S.D.N.Y. 274 F. Supp 561; *Cambist Films, Inc. vs. Illinois*, N.D. 111, *Eastern Div.*, 292 F. Supp 185, decided October 21, 1968.

"The procedure employed in the instant case was little better than that condemned by the Court in *Lee Art Theatre, Inc. vs. Virginia*, 392 U.S. 636, 88 S. Ct. 2103, 20 L. Ed. 2d 1313 decided by a *brief per curiam* on June 17, 1968. In *Lee Art Theatre*, the magistrate issued the warrant on the basis of an

affidavit of a police officer stating that he had determined from personal observation that certain named motion pictures were obscene. In the instant case, the affidavit contained only slightly more than such conclusory allegations. In neither case did the magistrate view the film before issuing the warrant. The procedure followed in Lee Art Theatre 'fell short of constitutional requirements demanding necessary sensitivity to freedom of expression.' The same is true of the procedure followed in the instant case and the film must be returned to plaintiff."

In *Cambist Films, Inc. vs. State of Illinois*, United States District Court, Northern District of Illinois, Eastern Division, 292 F. Supp. 185 (1968), it was held as follows:

"The seizure of the film and the related criminal prosecution were undertaken in clear violation of [fol. 493] the First Amendment of the Constitution of the United States. It is well established that prior to suppression of law enforcement officials of allegedly obscene material there must be an adversary hearing on the question of obscenity. The law demands this procedural safeguard to ensure against the prior restraint and suppression of constitutionally protected expression. *A Quantity of Copies of Books vs. Kansas*, 378 U.S. 205, 211-22 (1964); *Metzger vs. Percy*, 393 Fed. 2d 202 (7th Cir. 1968).

"Defendants contend that the constitutional requirement of an adversary hearing was satisfied in this case by virtue of the informal gathering of the prosecuting authorities, a local Magistrate and a County Circuit Judge in the Princess Theatre, which took place before the film was seized. But there is no due process, constitutional or otherwise, in such a gathering. A Judge is not discharging the duties of his office or conducting a court when he attends a movie theatre as a paying patron. More important, by definition, the heart of an adversary proceeding before suppression of a medium of expression may be effected, is the opportunity for adversary presentation

to ensure that expression will not be suppressed without contest and justification. The absence of a formal adversary proceeding is therefore in fact and in law constitutionally critical. Our freedoms survive and thrive through institutions and procedures such as the adversary hearing required in this case."

In a case out of the United States District Court for the Southern District of N.Y., *BEE SEE BOOKS, Inc. and V.I.P. Novelties, Inc. vs. Leary as Police Commissioner of New York*, 291 F. Supp 622 (1968), Judge Frederick V. Bryan wrote:

"... The Constitution requires that any restraints on the distribution of publications on the ground of their obscenity can only be imposed after an adversary judicial proceeding on the question of obscenity. *A Quantity of Books vs. Kansas supra.*"

In a case out of the Southern District of Florida, Case No. 68-1392-Civ.-CA, styled, *John H. Anderson vs. Charles T. Carlton et al.* (1968), the court stated:

"It appearing that there was no adversary hearing on the question of obscenity before the seizures complained of in violation of the Plaintiff's rights under the First Amendment to the Constitution of the United States as applied through the Fourteenth Amendment:

[fol. 494]

"... The issues of law are controlled by the decision of the Supreme Court in *A Quantity of Books vs. Kansas*, 378 U.S. 205 (1964), and therefore all books, documents, and other publications heretofore confiscated by the Defendants, their employees and agents should be, and hereby are ordered returned to the Plaintiff instanter."

In recent months many Federal Courts throughout the United States have had occasion to consider the issue of searches and seizures by state and local law enforcement officials, under civil or criminal proceedings instituted by said

officials in the local State Courts. The Federal Courts have almost consistently upheld that any search or seizure not preceded by a judicially supervised adversary hearing was constitutionally deficient and either enjoined further seizures and criminal prosecutions based thereon, or ordered the immediate return of the seized items, or both.

A brief summary of the citations of this recent spate of cases include the following:

"DELTA BOOK DISTRIBUTORS, Inc., Et. Al. vs. Cronvich Etc. et al. DC - ED of La., New Orleans Division, 304 F. Supp. 662 Before a Three Judge Court: (1969)

"Since prior restraint upon the exercise of First Amendment rights can be exerted through seizure (with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizure and arrest, the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity.

"Applying these principles to the cases before us, the arrests, as well as the seizures claimed to be incident thereto, are clearly invalid for lack of a prior adversary determination of the obscenity of the materials upon which the arrests and seizures were based. The fact that in each case some materials were purchased, rather than seized is of no moment in view of the requirement of an adversary determination of obscenity prior to arrest or threat of arrest."

[fol. 495] *Masters et al vs. Russell, et al DC - M.D. of Fla. Case No. 69-377 Civ. T. (1969)*

"4. On May 8, 1969, search warrants for the plaintiffs' places of business were issued by the Civil

& Criminal Court of Record for Pinellas County. On May 9, 1969, the warrants were executed and various publications were taken from the plaintiffs. On that date the plaintiffs were also arrested and charged with violations of Fla. Stat. 847.012 (1967). Said charges are based on the sale of the four publications purchased by the State Attorney's office on April 28, 1969.

"5. There has been no adversary judicial proceeding on the determination of whether or not the publications sold or the publications seized pursuant to the warrants are in fact obscene, or in fact violative of the Florida Statutes."

"On the basis of the foregoing facts, without making any finding as to whether any of the publications purchased or seized are obscene, it is the Court's determination that the arrests and charges brought against the plaintiffs as a result of the sale of four of the publications, and the seizure of other publications from the plaintiffs, both events being without a prior adversary determination of obscenity, produces irreparable harm or risk or irreparable harm to the plaintiffs.

"This order should not be misread. Let no one infer that this Court seeks to impede responsible and vigorous state action designed to check the flow of obscenity in our society. The Court, as well as the public, is aware of the needs in this area. But as the end does not justify the means, here basic constitutional rights may not be trampled under the banner of public morality. If the phrase 'law and order' has any meaning, certainly it requires public enforcement officials to operate within the framework of our Constitution. It is, therefore,

"ORDERED AND ADJUDGED"

"1. That the defendants are restrained from proceeding with the prosecution described in the

complaint, and are restrained from making any arrests or seizures, for use as evidence in any prosecution or for the purpose of suppression, of publications believed by them, or any of them, to be in violation of law because obscene, without there having been a prior adversary hearing on a determination of the question of obscenity in accordance with the requirements set out in *Marcus vs. Property Search Warrants*, 367 U.S. 717; *A Quantity of Books vs. Kansas* 378 U.S. 205; *Delta Books Distributors vs. Cronvich*, 68-1927 E. Dist. La.[fol. 496] N.O. Div.; *City News vs. Carson*, 298 F. Supp. 706 (M.D. Fla. 1969)."

In *Miske vs. Spicola*, D. C. Middle District of Florida, Tampa Division, Case No. 69-366-Civ. T. (December 9, 1969), the Court, in a declaratory judgment, stated;

"The Court holds that the seizures, either with or without a warrant, are constitutionally invalid for lack of a prior adversary determination of the obscenity of the materials upon which the seizures were based. *Delta Books Distributors vs. Cronvich*, 68-1927 E.D. La. N.O. Div; *Marcus vs. Property Search Warrants*, 367 U.S. 717; *A Quantity of Books vs. Kansas*, 378 U.S. 205. This holding requires the return of the seized materials."

Carter vs. Gautier, 305 F. Supp. 1098:

"Under the law as now established by the Supreme Court . . . it is illegal for officers to seize a movie film unless and until there has been held a prior adversary judicial hearing upon the question of obscenity."

In *Gable vs. Jenkins*, D. C. Northern District of Georgia, Civil Action No. 13001 (October 24, 1969), the Three Judge Court stated:

"In the case, *sub judice*, the material was seized without a prior adversary hearing; and, therefore, the procedure is in conflict with the proper constitutional standards."

The Supreme Court of Pennsylvania in a decision rendered on November 12, 1968, styled, *Commonwealth of Pennsylvania vs. Guild Theatres, Inc. et al*, 248 A.2d 45, held that *ex parte* action on the part of the District Attorney in instituting a Complaint to restrain the exhibition of a film on the grounds of its obscenity and obtaining an injunction from the Court was unconstitutional. Defendants noted objections to the issuance of the *ex parte* injunction and asserted *inter alia*:

"2) An injunction should not have been issued to restrain the showing of a motion picture without a prior determination of obscenity in an adversary judicial proceeding."

[fol. 497] The lower Court overruled the objection but the Supreme Court of Pennsylvania reversed stating:

"We hold that the Court below erred in granting the injunction and overruling the preliminary objections. The procedure followed in this case was shockingly defective in at least two respects - the hearing without notice on the evening of July 19th, and the censorship without provision for a prompt judicial decision."

The Court went on to state:

"It is true that obscenity is not within the purview of the protections of the First and Fourteenth Amendments . . . however, the very question at issue here is whether this picture is obscene, and *until it is judicially so adjudged, it is entitled to those protections.*"

In a most recent pronouncement of the Supreme Court of the United States involving *First Amendment* rights and "prior restraint," *Carroll vs. President and Commissioners of Princess Anne, et al*, 21 L. ed 2d 325, decided November 19, 1968, Mr. Justice Fortas, expressing the views of eight (8)

members of the Court set aside an *ex parte* injunction granted by the Maryland Courts which prohibited the holding of a rally and stated the rationale as follows:

"It was issued *ex parte*, without notice to petitioners and without any effort, however informal to invite or permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

"We do not here challenge the principle that there are special, limited circumstances, in which speech is so interlaced with burgeoning violence that it is not protected by the broad guaranty of the First Amendment. In *Cantewell vs. Connecticut*, 310 U.S. 296, at 308, 84 L Ed 1213, at 1220, 60 S. Ct. 900, 128 ALR 1352 (1939), this Court said that 'No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot.' See also *Chaplinsky vs. New Hampshire*, 315 U.S. 568, 72, 86 L Ed 1031, 1035, 62 S Ct. 766 [fol. 498]. (1942); *Milkwagon Drivers Union vs. Meadowmoor Dairies*, 312 U.S. 287, 294, 85 L Ed 836, 841, 61 S.Ct. 552, 132 ALR 1200 (1941). Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. (Emphasis supplied) The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment."

"Measured against these standards, it is clear that the 10 day restraining order in the present case, issued ex

parte, without formal or informal notice to the petitioners or any effort to advise them of the proceeding, cannot be sustained. Cf. *Marcus vs. Search Warrant*, 367 U.S. 717, 731, 6 L Ed 2d 1135, 81 S Ct. 1708 (1961); *A Quantity of Books vs. Kansas*, 378 U.S. 205, 12 L Ed 2d 809, 84 S. Ct. 1723 (1964). In the latter case, this Court disapproved a seizure of books under a Kansas statute on the basis of *ex parte* scrutiny by a judge. The Court held that the statute was unconstitutional. Mr. Justice Brennan, speaking for a plurality of the Court, condemned the statute for 'not first affording (the seller of the books) an adversary hearing' (emphasis supplied 378 U.S. at 211, 12 L Ed. 2d at 813).

"...there is no justification for the *ex parte* character of the proceedings in the sensitive area of First Amendment rights.

"The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate."

"In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication."

"The same is true of the fashioning of the order. An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental liberties when the end can be more narrowly achieved.' *Shelton vs. Tucker*, 364 U.S. 479, 48, 5

L. Ed 2d 231, 237, 81 S. Ct. 247 (1960). In other words, the order [fol. 499] must be tailored as precisely as possible to the exact needs of the case. The participation of both sides is necessary for this purpose. Certainly, the failure to invite participation of the party seeking to exercise First Amendment Rights reduces the possibility of a narrowly drawn order and substantially imperils the protection which the Amendment seeks to assure. (Emphasis supplied)."

"... In the present case, it is clear that the failure to give notice, formal or informal, and to provide an opportunity for an adversary proceeding before the holding of the rally was restrained, is incompatible with the First Amendment."

It makes no difference if the seizure takes place with or without a search warrant and even if the prosecution would attempt to rely on the concept that the search was incidental to an arrest, or the material was contraband, and thus a misdemeanor committed in the presence of the officer. This rationale when viewed in the context of the many cases cited herein and the language used by the various Courts could not be sustained.

In the case of *City News Center, Inc. vs. Carson, Case No. 69-268-Civ.-J* (U.S.D.C. M.D. Florida-February 25, 1970), the District Court granted a preliminary injunction enjoining the Respondents from enforcing the *Florida Obscenity Statute, Section 847.011*, in an unconstitutional manner against the Petitioner and ordered all materials seized or purchased to be returned to Petitioner and to be suppressed as evidence. The Court found that no arrest warrant or search warrant had been obtained prior to the seizure and that an arrest warrant was obtained from a Justice of the Peace only after the arrest and seizure. In a well reasoned opinion, the Court stated:

[fol. 500] "The seizures made here were in flagrant disregard of the constitutional requirements of due

process of law which require a prior adversary, judicially-supervised hearing before seizure. Without this threshold protection, the evanescent freedom of unintimidated expression, guaranteed by the Bill of Rights, becomes meaningless. The great weight of authority now requires a prior evidentiary hearing in all cases regarding seizure of alleged obscenity, whether films or books."

—With respect to the issue of probable cause, the Court stated:

"Respondents make the contention that the seizures made here were incident to an arrest for the act of selling obscene materials, which alleged illegal act took place in the presence of the arresting officer. In making such an arrest, the officer necessarily was placed in the position of having to determine probable cause that the materials being sold were in fact obscene before the arrest could be made. An ad hoc determination of obscenity by a single officer, uninformed by no more than three weeks experience with the vice squad and unfamiliar, by study or briefing, with constitutional principles is grossly insufficient to protect against unwarranted infringement of freedom of expression.

"Even with the benefit of experience and briefing on the law, such a procedure would be inadequate because probable cause as to whether obscenity exists has come to be recognized as a matter of *constitutional judgment* unique in the law because of the fragile nature of the right protected, and incapable of determination by a *policeman, grand jury, or judge acting ex parte*, without a prior finding of probable cause in a judicially-supervised adversary hearing. See, e.g., *New York v. Saka*, No. 94.68 (Dutchess County Court, New York, filed February 7, 1969) (dismissal of grand jury indictment because no prior adversary hearing has been had). (Emphasis added)

"Consequently, because the delicate nature of the protected right makes the finding of probable cause a matter for constitutional judgment, a prior adversary hearing is necessary before an arrest can be made, even where the sale of allegedly illegal materials takes place in the presence of the arresting officer. *Delta Book Distributors vs. Cronvich, supra*, at 667.

"This Court finds that because a prior adversary hearing was not held, a preliminary injunction should issue, and that the materials seized or purchased [fol. 501] should be returned and suppressed from use in pending or future prosecutions arising from the events of April 10, 1969."

In the light of the opinions of the various responsible Federal Courts hereinbefore cited, the "sensitive tools" referred to in *Speiser, supra*, have been interpreted to mean that a judicially superintended adversary hearing on the issue of obscenity *vel non* is constitutionally mandated prior to arrests and criminal prosecutions based on alleged obscenity. Therefore, since the Appellants, Cantey, Mitchum and Ballue were not given notice or were given insufficient notice of and the opportunity to participate meaningfully in an adversary judicial hearing on the question of the obscenity *vel non* of the alleged obscene publications prior to his arrest, a temporary injunction should not have been issued by the Circuit Court to enjoin the Appellants, their agents, servants, and employees from continuing their business.

CONCLUSION

The Court erred in suppressing unconstitutionally the 19 publications in evidence and the thousands of publications being sold at the Book Mart for the reasons that there has been no judicially superintended adversary hearing nor a judicial determination of obscenity of the 19 publications in evidence nor the thousands of publications not in evidence.

The suppression of the sale of these materials by closing down the bookstore is an unconstitutional and unlawful prior restraint, and the order of suppression should be reversed.

[fol. 502] III. ABATEMENT OF ALLEGED NUISANCE NOT SUFFICIENT JUSTIFICATION FOR PRIOR RESTRAINT OF FIRST AMENDMENT FREEDOMS.

Nuisance prevention legislation is historically founded upon the thesis that one may use his property in any manner he deems fitting to the limitation that this use shall not infringe upon his neighbor's use of property adjacent thereto or upon the health, safety, comfort or morals of the community. To constitute a nuisance, the act, structure, or device complained about must cause some injury, real and not fanciful, *Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Commission*, 216 N.E.2d 788, and a nuisance must affect either the comfort, morals or health of the public to fall within statutory classification, *Sparks v. City of Pella*, 137 N.W.2d 909 (Iowa).

A nuisance may be either private or public, *Bishop Processing Co. v. Davis*, 132 A.2d 445 (Md). For the condition to be a public nuisance it must produce a common injury and constitute an obstruction to public rights, *Mandel v. Pivnick*, 125 A.2d 175 (Conn); and may be proscribed if the activity be harmful to the public health, create an interference with a way of travel or the peaceful use of public land and streets, *Garfield v. Young*, 82 N.W.2d 876 (Mich).

Similarly, nuisances have been found to exist in the unreasonable, unwarrantable or unlawful use by a person of his property, real or personal, and the producing of such material annoyance, inconvenience, discomfort or hurt thereby that the law may abate it, *Commonwealth v. Baird*, 21 Erie 200 (Penna); *Chaflin v. Glick*, 177 N.E.2d 293 (Ohio), *State ex Rel Bove v. Hill*, 167 A.2d 738 (Del);

Westwood Development Co. v. Esponge, 342 S.W.2d 623 (Tex); and *Harting v. Milwaukee County*, 86 N.W.2d 475 (Wis).

[fol. 503] The various legislatures are empowered and have great latitude in regulating activities that affect the community as a whole. The contrary is true, however, when such regulations infringe upon the freedoms guaranteed by virtue of the *First Amendment* made applicable to the states under the *Fourteenth Amendment*. The Supreme Court of Texas in *State v. Spartan's Industries, Inc.*, 447 S.W.2d 407, stated the following of the state's police power in regulating purported nuisances:

"It is true that the Legislature may not validly declare something to be a nuisance which is not so in fact, but that depends upon the question of whether that which is declared to be a nuisance endangers the public health, public safety, public welfare, or offends the public morals."

In the freedoms of speech and press the protected words include not only books and newspapers but magazines, films, pamphlets, and leaflets. It not only protects the creation but the publishing and circulation. The Supreme Court of the United States in *Lovell v. Griffin*, 303 U.S. 44, stated:

"The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager."

"We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John [fol. 504] Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish 'without a license what formerly could be published only with one.'

"The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.

"The ordinance cannot be saved because it relates to distribution and not to publication. *"Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."* Ex parte Jackson, 96 U.S. 727, 733, 24 L. ed. 877, 879. The license tax in *Grosjean v. American Press Co.*, 297 U.S. 233, 80 L.ed. 660, 56 S. Ct. 44, supra, was held invalid because of its direct tendency to restrict circulation." (Emphasis supplied).

The Supreme Court has held that this freedom of speech and press is a fundamental right and legislative preference in selection of modes in combating purported evils is insufficient justification for imposition of unconstitutional "prior restraint." It is not occasional abuse of censorial power that is prohibited but the threat inherent in censorship of any nature

that creates the danger to these freedoms. The Court in *Thornhill v. Alabama*, 310 U.S. 88, states:

"First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.

"Those who won our independence had confidence in the power of free and fearless reasoning and communication [fol. 505] of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.

"Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations.

"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."

... "A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview."

... "It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support [fol. 506] abridgment of freedom of speech and, of the press concerning almost every matter of importance to society."

... "But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment,

of the liberty of such discussion can be justified only where circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

The State of Alabama in that case argued that the purpose of the legislation limiting freedom of discussion was to protect the community from violence and breach of the peace arising out of picketing. The Supreme Court rejected this contention as there was no clear and present danger of destruction of life or property or of a breach of the peace.

The United States Supreme Court as early as 1931 was confronted with a state limitation on *First Amendment* freedoms utilizing the concept that the exercise of those rights constituted a nuisance in the type and manner of speech and the type and manner of its dissemination. There the District Court of Hennepin County, Minnesota adjudged a publication disseminated by "Near" to be a nuisance in that it was a "malicious, scandalous and defamatory newspaper" and thereafter enjoined further like publications. The Supreme Court of Minnesota affirmed on appeal the lower court judgment. The Supreme Court of the United States reversed and held as unconstitutional the portions of the statute permitting the restraint upon *First Amendment* freedoms by declaring such activity a nuisance and permitting injunctions against future publications and dissemination. The Court there [fol. 507] in *Near v. Minnesota*, [fol. 507 is illegible—see page 443].

In Hear v. Minnesota, 283 U.

statute and the Court's rea...

"Section 1: Any
a member or employ
organization, or
employees of a cor
business of regul
lishing or circul
or giving away,

"(a) an obscene, magazine, or other

"(b) a malicious,
paper, magazine o.

"is guilty of a nu.
such nuisance may
vided.

"Section two provides that no person shall be committed or confined in any county where any such nuisance is circulated, or in any county which has proceeded upon written complaint of a reputable citizen, or upon the failure or refusal of the board of health of such county, to maintain and remove the same. The board of health of the county in which such nuisance is perpetuated shall be held perpetually the party responsible for such nuisance from the date of its circulation.

• • •

"At the beginning and upon the very directing the defendant injunction should defendants to publish session any edition 27, 1927, to November publishing, circuit 'any future edition' any publication, containing malicious of the kind alleged otherwise."

• • •

"The court further:

1, stated the following of the

who, as an individual, or as a firm, or association or officer, director, member or partner, shall be engaged in the business of customarily producing, publishing or distributing, or having in possession, selling

and lascivious newspaper,
radical, or

alous and defamatory news-
periodical;

and all persons guilty of joined, as hereinafter pro-

that whenever any such nuisance
the county attorney of any
periodical is published or
of his failure or refusal to
quest in good faith of a re-
torney general or upon like
the latter, any citizen of the
action in the district court
of the state to enjoin
committing or maintaining any
her committing or maintaining

action on November 22, 1927, complaint, an order was made to show cause why a temporary issue and meanwhile forbidding the circulate or have in their possession the periodical from September 1, 1927, inclusive, and from or having in their possession, said 'The Saturday Press' and by any other name whatsoever scandalous and defamatory matter plaintiff's complaint herein or

"The Court further found that the defendants through [fol. 508] these publications 'did engage in the business of regularly and customarily producing, publishing, and circulating a malicious, scandalous, and defamatory newspaper,' and that 'the said publication' 'under said name of The Saturday Press, or any other name, constitutes a public nuisance under the laws of the state.' Judgment was thereupon entered adjudging that 'the newspaper, magazine and periodical known as The Saturday Press, as a public nuisance, be and is hereby abated.' The judgment perpetually enjoined the defendants 'from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is malicious, scandalous or defamatory newspaper, as defined by law,' and also 'from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title.'

... "This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of persons and property.

...

"Liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

"This suppression is accomplished by enjoining publication and that restraint is the object and effect of the statute.

"The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the [fol. 509] constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.

"Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he published what is improper, mischievous or illegal, he must take the consequence of his own temerity."

The Court then quoted with approval from *Patterson v. Colorado*, 20 U.S. 454:

"In the first place, the main purpose of such constitutional provisions is to prevent all such previous restraints upon publications as had been

practised by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."

and thereafter stated:

"In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or any commit, by his publications, the state appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

"Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint.

"The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication."

Under the reasoning set forth by the United States Supreme [fol. 510] Court over three decades ago it is patently true that a state may not declare the dissemination of *First Amendment* materials to be a nuisance. Similarly these freedoms may not constitutionally be enjoined.

Since *Near v. Minnesota*, supra, courts have been called upon numerous times to delineate the power of the legislatures to enact legislation limiting *First Amendment* freedoms. The United States Supreme Court in *Butler v. Michigan*, 352 U.S. 380 (1957), reversed a state court conviction and held the Michigan statute as unconstitutional in limiting the exercise of these freedoms and of the right of the public to receive them, stated:

"The State insists that, by thus guarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence it is exercising its power to promote the general welfare.

"We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society."

These courts have placed the bounds on the restrictions at the point where the exercise of these freedoms would constitute a clear and present danger to society and government, *American Communications Assoc. C.I.O. v. Douds*, 339 U.S. 382; *Schenk v. U.S.*, 249 U.S. 47; and *Bridge v. California*, 314 U.S. 252.

The County of Los Angeles attempted to preclude the dissemination of crime "comic books" to persons under 18

years of age but the [fol. 511] statute was found to be unconstitutional for not adhering to the necessity of a clear and present danger, *Katzev v. County of Los Angeles*, 341 P.2d 310.

The United States Supreme Court again in *Cantwell v. Connecticut*, 310 U.S. 305, delineated some of the limitations upon state restrictions of *First Amendment* freedoms and stated:

"The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment.

"Thus the Amendment embraces two concepts, — Freedom to believe and freedom to act. The First is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

"Conviction on the fifth count was not pursuant to a statute evincing a legislative judgment that street discussion of religious affairs, because of its tendency to provoke disorder, should be regulated, or a judgment that the playing of a phonograph on the streets should in the interest of comfort or privacy be limited or prevented. Violation of an Act exhibiting such a legislative judgment and marrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the State's policy would weigh heavily

in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature.

...
 "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the [fol. 512] state to prevent or punish is obvious. *Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.*" (Emphasis supplied).

In that case Cantwell had been convicted of the crimes of soliciting without a license and Breach of the Peace for extolling the view that all religions and in particular Catholicism was bad. The United States Supreme Court reversed those convictions.

The United States District Court for the Southern District of New York in *Konigsberg v. Time, Inc.*, 288 F.Supp 989 (1968) had before it a matter where an injunction was sought to prevent the publication of magazine articles. Judge Pollock denied the injunction as such a request was repugnant to the principles of the *First Amendment* and the courts of equity and stated:

"Plaintiff seeks to enjoin defendant from publishing magazine articles which allegedly libel the plaintiff and the August 9, 1968 issue of Life Magazine in

particular which contains an article entitled 'The Mob: The Congressman and the Hoodlum' and which contains statements regarding the plaintiff which, if false, would constitute libel.

"A court of equity will not, except in special circumstances, issue an injunctive order restraining libel or slander or otherwise restricting free speech.

"To enjoin any publication, no matter how libelous, would be repugnant to the First Amendment to the Constitution, Crosby v. Bradstreet Co., 312 F.2d 483, (2d Cir. 1963); Parker v. Columbia Broadcasting System, Inc., 320 F.2d 937 (2d Cir. 1963); cf. Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 51 S. Ct. 625, 75 L.ed. 1357 (1931), and to historic principles of equity. American Malting Co. v. Keitel, 209 F. 353 (C.C.A. 2, 1913).

"The motion for an injunction is therefore denied."
(Emphasis supplied).

An appellate court of New Jersey recently had a matter involving the proscription of a film before it in that the film was [fol. 513] deemed by the officials as obscene and proscribable. The court therein *Lordi v. V.A. New Jersey Theaters, Inc.*, 259 A.2d 734, stated the tests in determining a particular work as obscene and then held that this criteria must be met regardless whether the proscription was criminal or civil. In dealing with proscription the court noted the difference between material disseminated to adults verses that disseminated to children but precluded the complete suppression of a work and stated:

"While the State has no interest in and may prevent the dissemination of material deemed harmful to children, that interest does not justify a total suppression of such material, for to do so would

reduce the adult population to seeing and reading only what is fit for children. *Butler v. Michigan* 352 U.S. 380, 383, 77 S. Ct. 524, 1 L.Ed.2d 412 (1957); *Jacobellis v. Ohio*, *supra*."

What the New Jersey court held there is appropo to the case at bar. The state interest does not justify a total suppression of such interference, it must appear that the injury resulting from the alleged nuisance is or will be irreparable. It must be conceded that the dissemination of a publication will not work irreparable harm.

In the case of *Speiser v. Randall*, 357 U.S. 513, 525 (1958), the United States Supreme Court stated:

"the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn... and the reportation of legitimate from illegitimate speech calls for... sensitive tools."

In 1957, the Court considered a question concerning the constitutionality of a civil injunctive statute from the state of New York, which was designed to supplement the existing conventional criminal provisions dealing with pornography by authorizing the invo- [fol. 514] cation of a "limited injunctive remedy" under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene, and to obtain an order for the seizure in default of surrender, of the condemned publications.

In that case, entitled, *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, the Court approved the statutory scheme as the same was interpreted by the New York Court, and found it constitutionally correct. Time and Time again the Supreme Court has pointed to the statute in *Kingsley Books, Inc.* as a procedural model for other state legislatures to follow in supplementing their criminal obscenity statutes.

In commenting on the case of *Kingsley Books, Inc.* in the case of *A Quantity of Copies of Books, et al. v. Kansas*, 378 U.S. 205 (1964), at page 209, the plurality opinion stated:

"... since P-K was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issued, the procedure was likewise constitutionally deficient. This is the teaching of *Kingsley Books, Inc. v. Brown*, 354 U.S. 436. See *Marcus* 367 U.S. at pp. 734-738. The New York injunction procedure there sustained does not afford ex parte relief but postpones all injunctive relief until 'both sides have had an opportunity to be heard,' *Tenny vs. Liberty News Dist.* 215 NYS 2d 663, 664. In *Marcus* we explicitly said that *Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of those publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene. 367 U.S. at 735-736."

In a later case involving in essence the question common to the present proceeding, of, "prior restraint" and "chilling effect", on the exercise of *First Amendment* rights, the Supreme [fol. 515] Court in a case styled, *Freedman v. Maryland*, 380 U.S. 51, at 60 (1965), stated:

"How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme, is, of course, for the State to decide. But a model is not lacking; in *Kingsley Books, Inc. v. Brown*, 365 U.S. 436, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing'." (Emphasis supplied).

In a case decided by the Supreme Court in 1968, *Teitel Film Corporation v. Cusack, et al*, 390 U.S. 139, the Court again made comment about the necessity for procedural safeguards in the sensitive area of *First Amendment* rights.

Finally, in November, 1968, the Court issued its unanimous opinion in a monumental decision entitled, *Carroll vs. President and Commissioners of Princess Anne, et al*, 393 U.S. 175, and on the issue of *ex parte* injunctions in *First Amendment* cases, stated:

"There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate. 'any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity', *Bantam Books vs. Sullivan*, 372 U.S. 51, 57 (1965). And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in *Freedman v. Maryland*, *supra*, at page 58, a non-criminal process of prior restraints upon expression 'avoid constitutional infirmity only 'if it takes place under procedural safeguards, designed to obviate the dangers of the censorship system' "

[fol. 516] In *Gundlach vs. Rauhauser*, 304 F. Supp. 962 (1969), the United States District Court for the Middle District of Pennsylvania, Three Judge Court, in declaring a section of that State's obscenity statute to be constitutionally deficient and in permanently enjoining the District Attorney

from further proceeding against the plaintiff under that section, stated on page 963:

"It will be noted that Section (g) of the Pennsylvania Act authorizes the District Attorney to institute proceedings in equity for the purpose of enjoining the sale and distribution of any written or printed matter of an obscene nature. Moreover, Section (g) specifically provides for the issuance of a preliminary injunction, ex parte, upon the averment of the District Attorney that the sale or distribution of such publication constitutes a danger to the welfare or peace of the community. Thereafter, a hearing is to be held in conformity with the Rules of Civil Procedure. Plaintiff contends, in this action, (a) that Section (g) of the Pennsylvania Obscenity Statute violated the First Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment, and (b) that the publications and materials involved herein are not obscene in the constitutional sense as a matter of law.

"We need only consider point (a) as it is apparent that Section (g) is defective, in that it provides for the issuance of a preliminary injunction, without notice, in an area involving 'basic freedoms guaranteed by the First Amendment' and, further, that it fails to establish the necessary procedural safeguards to insure prompt and final judicial decision."

In the case styled, *HMH Publishing Co., Inc. v. Oldham*, 306 F. Supp. 495 (1969), the United States District Court for the Middle District of Florida, Ocala Division, vacated a state court ex parte injunction restraining the sale of the magazine *Playboy* unless certain pages containing allegedly obscene matter were deleted and enjoined the state attorney from securing further [fol. 517] injunctions without first holding,

after due notice, a judicially supervised adversary hearing on the question of obscenity. The complaint which the state attorney filed in the state court against the Plaintiff was captioned "Complaint Under Florida Statutes, Section 60.05, F.S.A. to Enjoin and Abate a Public Nuisance and Under the Provisions of Florida Statutes 847 Prohibiting the Sale or Distribution of Obscene Lewd Magazines to Minors."

The District Court stated at page 496:

"The injunction was applied for and granted without prior notice and without the holding of any prior adversary hearing to determine the obscenity or illegality of the October 1969 issue of PLAYBOY. The cases are legion which hold that a prior adversary hearing must be held and a judicial determination of the question of obscenity must be obtained before law enforcement officers may move to suppress the dissemination of alleged obscene matter. Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L.Ed. 2d 809 (1964); Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed. 2d 1127 (1961); Tyrone, Incorporated v. Wilkinson, 410 F.2d 639 (4th Cir. 1969); Metzger v. Percy, 393 F.2d 202 (7th Cir. 1968); Grove Press Inc. v. City of Philadelphia, 300 F. Supp. 281 (E.D. Pa. 1969); City News Center, Inc. v. Carson, 298 F. Supp. 706 (M.D. Fla. 1969); Master v. Russell, — F. Supp. — (M.D. Fla. 9/24/69); Morrison v. Wilson, — F. Supp. —, (N.D. Fla. 9/5/69); Carter v. Gautier, 305 F. Supp. 1098 (M.D.Ga. 9/15/69); Mandell v. Carson, — F. Supp. — (M.D. Fla. 10/8/69); Delta Books Distributors v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969); Felton v. City of Pensacola, 200 So.2d 842 (1st D.C.A. Fla. 1967). This procedure has been adopted because what is obscene and what is not obscene is sometimes separated by a finely drawn line and the Fourteenth Amendment to the United

States Constitution requires that regulation by the states of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression."

In the case of *City News Center, Inc. v. Carson*, Case No. 69-268-Civ.-J (U.S.D.C. M.D. Florida - February 25, 1970), the District Court granted a preliminary injunction enjoining the respondents [fol. 518] from enforcing the *Florida Obscenity Statute, Section 847.011*, in an unconstitutional manner against the petitioner and ordered all materials seized or purchased to be returned to petitioner and to be suppressed as evidence. The Court found that no arrest warrant or search warrant had been obtained prior to the seizure and that an arrest warrant was obtained from a Justice of the Peace only after the seizure and arrest. In a well reasoned opinion, the Court stated:

"The seizures made here were in flagrant disregard of the constitutional requirements of due process of law which require a prior adversary, judicially-supervised hearing before seizure. Without this threshold protection, the evanescent freedom of unintimidated expression, guaranteed by the Bill of Rights, becomes meaningless. The great weight of authority now requires a prior evidentiary hearing in all cases regarding seizure of alleged obscenity, whether films or books."

With respect to the issue of probable cause the Court stated:

"Respondents make the contention that the seizures made here were incident to an arrest for the act of selling obscene materials, which alleged illegal act took place in the presence of the arresting officer. In making such an arrest, the officer necessarily was placed in the position of having to determine probable cause that the materials being sold were in

fact obscene before the arrest could be made. An ad hoc determination of obscenity by a single officer, uninformed by no more than three weeks of experience with the vice squad and unfamiliar, by study or briefing, with constitutional principles is grossly insufficient to protect against unwarranted infringement of freedom and expression.

"Even with the benefit of experience and briefing on the law, such a procedure would be inadequate because probably cause as to whether obscenity exists has come to be recognized as a matter of *constitutional judgment*; unique in the law because of the fragile nature of the right protected, and incapable of determination by a policeman, grand jury, or judge acting *ex parte*, without a prior finding of probably cause in a judicially supervised adversary hearing. See, e.g., *New York, v. Saka*, No. 94/68 (Dutchess County Court, New York, filed Feb. 7, 1969) (dismissal of grand jury indictment because no prior adversary hearing has been had.)—

"Consequently, because the delicate nature of the protected right makes the finding of probable cause a matter for constitutional judgment, a prior adversary hearing is necessary before an arrest can be made, even where the sale of allegedly illegal materials takes place in the presence of the arresting officer. *Delta Book Distributors v. Cronvich*, *supra*, at 667."

The Court further added:

"No allegation is made that sales were made to children or that children had been in the room set apart for adults and marked accordingly. See *Ginsberg v. New York*, 390 U.S. 629 (1968). Admission to the room was regulated by an attendant at the door. No allegation is made that pandering or obtrusion on the

sensibilities of those adults not wishing to encounter such material has occurred. See *Redrup v. New York*, 386 U.S. 767 (1967).

"In accordance with the findings above and those facts reported at 209 F. Supp. 706, this Court finds that the seizures were made in bad faith and for the purpose of suppressing the seized materials during at least the period of prosecution, thereby chilling the public's right to freedom of expression and to receive information, see *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), *Karalex v. Byrne*, — F. Supp. —, No. 69-665-J-Civ. (D. Mass., Nov. 28, 1969), *injunction stayed*, 38 U.S.L.W. 3221 (U.S., Dec. 15, 1969); *United States v. Thirty-Seven Photographs*, 38 U.S.L.W. 2440 (D.C. Calif., Jan. 27, 1970), and depriving petitioner of its rights to fundamental due process...

"This Court finds that because a prior adversary hearing was not held, a preliminary injunction should issue, and that the materials seized or purchased should be returned and suppressed from use in pending or future prosecutions arising from the events of April 10, 1969."

In the case of *Commonwealth of Pennsylvania v. Guild [fol. 520] Theatre Inc. et al*, 248 A.2d 45, the district attorney proceeded in equity on the common-law theory of public nuisance against the exhibitors of an allegedly obscene motion picture and it was held that:

"Ex parte action on the part of the District Attorney in instituting a complaint to restrain the exhibition of a film on the ground of its obscenity and obtaining an injunction from the Court was unconstitutional."

The Court further stated:

"We hold that the Court below erred in granting the injunction and overruling the preliminary objections. The procedure followed in this case was shockingly defective in at least two respects — hearing without notice on the evening of July 19th, and the censorship without provisions for a prompt judicial decision.

"It is true that obscenity is not within the purview of the protections of the First and Fourteenth Amendments. . . however, the very question at issue here is whether this picture is obscene, and *until it is judicially so adjudged, it is entitled to those protections.*" (Emphasis supplied).

In the case styled, *Grove Press, Inc. v. City of Philadelphia*, 300 F. Supp. 281 (1969), the United States District Court for the Eastern District of Pennsylvania granted the plaintiff's motion for a preliminary injunction and enjoined the defendants from further prosecuting any proceeding attempting to prevent the exhibition of plaintiff's allegedly obscene film on the ground that it constituted a common-law public nuisance. In holding that such a proceeding violated the *First and Fourteenth Amendments to the United States Constitution*, the Court stated:

"Thus where a state seeks to exercise its power to prevent dissemination of allegedly obscene material it must establish precise objective standards by [fol. 521] which the work may be judged, as well as procedural safeguards adequate to insure the constitutionally protected expression will not be unduly curtailed. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, (L.Ed.2d 584 (1963), and *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L.Ed.2d 649 (1964).

"It follows *a fortiori* from those cases in which federal courts have held invalid state *statutory schemes regulating obscenity that suppression of expression on the 'common law' ground that it is a public nuisance is necessarily prohibited by the First and Fourteenth Amendments. This conclusion has been recognized by the Supreme Court since the germinal case of Cantwell v. Connecticut, 310 U.S. 296, 307-308, 60 S. Ct. 900, 84 L.Ed. 1213 (1939).*"

"*The City's attempt to enjoin the continued exhibition of 'I Am Curious-Yellow' on the ground that such exhibition is a nuisance is a procedure repugnant to the Due Process Clause of the Fourteenth Amendment in two respects: First, the substantive standard by which the alleged obscenity of the movie is to be judged, i.e., whether it is a 'common law nuisance' is so broad as to sweep within its purview not only properly regulated activities but also constitutionally protected activities; and secondly, the same standard is so vague as to be meaningless to those whose activities are sought to be measured by that standard.*"

"Measuring speech by the standard of common law nuisance fails to avoid either of those significant constitutional objections. See *Near v. Minnesota*, 283 U.S. 697, 707, 51 S. Ct. 625, 75 L.Ed. 1357 (1930)."

On appeal to the U.S. Court of Appeals for the Third Circuit, *Grove Press Inc. v. City of Philadelphia*, 418 F.2d 82 (1969), the Court there affirmed the District Court's decision but remanded the case for the limited purpose of having the District Court to modify its order to reflect the Circuit Court's precise holding. The Court stated:

"We have concluded that as a standard for regulating First Amendment rights, neither 'injury to the

public,' nor 'unreasonableness; standing alone, is [fol. 522] sufficiently narrow or precise to pass constitutional muster. Each is too elastic and amorphous a standard by which to restrain the exercise of free expansion. *What is encountered with the sprawling doctrine of public nuisance is an attempt to restrict First Amendment rights by means analogous to those under 'a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.'* *Cantwell v. Connecticut*, 310 U.S. 296, 308, 60 S. Ct. 900, 905, 84 L.Ed. 1213 (1940)." (Emphasis supplied).

"The common law of public nuisance may be a perfectly valid method by which to implement a state's police power in certain defined circumstances where, for example, it is used to restrain that which is prohibited by other constitutionally appropriate standards. It may not be used, however, both to define the standards of protected speech and to serve as the vehicle for its restraint."

"The mischief we perceive in the Pennsylvania equity rules is that there is no guarantee a final hearing will be reasonably scheduled after the issuance of a preliminary injunction and that a prompt decision will be forthcoming thereafter. The preliminary restraint could exist days, and even months, before the judicial decision on the merits; where this possibility exists, an unacceptable threat to the freedom of expression without due process of law results. Failure to provide the necessary expeditiousness tinges the Pennsylvania preliminary injunctive procedures with unconstitutional hues when they are employed to restrain or inhibit expression prior to a final adjudication of an alleged obscene matter."

"Where expression is inhibited as a result of prompt judicial decision reached after an adversary proceeding, there can be no procedural due process complaint. But where the inhibition occurs in a preliminary proceeding, with no guarantee of a prompt judicial decision on the merits, the procedure is constitutionally defective because a restraint of presumably protected expression not only occurs but is capable of persisting for an unlimited time prior to the required judicial determination."

In a case decided by a *nisi prius* Court in the State of Rhode Island, on June 27, 1969, involving in part the constitutionality [fol. 523] of a state statute authorizing *injunctions* in alleged obscene literature cases, the Providence Court (J. Weisberger, presiding), in a case styled *In Rem Seven Magazines, etc., Case No. M.P. 8215*, stated in pertinent part:

"In connection with this complaint an ex parte restraining order was issued pursuant to the provisions of 11-31.1-4. This restraining order was issued after examination by the Court of the magazines in question, but without notice to the publishers or sellers or an opportunity to be heard by said publishers or sellers. As a consequence the representatives of the publishers of these four magazines have asked that the ex parte restraining order be dissolved. The Court will first address itself to that issue.

"It would seem to the Court that the case of *Joseph Carroll, et al. v. President and Commissioners of Princess Anne, et al.*, decided by the United States Supreme Court and reported in 21 Lawyers Edition Second 325, (a 1968 case) as well as the *Marcus* case cited in the brief of the Attorney General and also in the brief submitted by the publishers of the four

magazines would indicate that the issuance of a restraining order ex parte is constitutionally impermissible in relations to matters which affect First Amendment rights.

"As a consequence, the Court is of the opinion that the ex parte restraining order heretofore issued was improvidently issued, and the same is hereby quashed."

The Complaint filed by the State of Florida, although lacking any affirmative showing of compelling need, would perhaps rely upon the concept that the County Prosecutor is attempting to protect society in one of three ways:

- (1) Sales to minors under a state statute reflecting a specific and limited concern therefore;
- (2) Sales to individuals that cause anti-social conduct,
- (3) Sales to individuals whose morals may be impaired by [fol. 524] the alleged salacious appeal of this material.

We recognize first that the complaint in this case indicated that there are no sales of these magazines to minors under any statute reflecting the state's specific and limited concern for juveniles as would seem to be constitutionally relevant in the cases of *Redrup vs. State of New York*, 386 U.S. 767, at page 768, and *Ginsberg vs. New York*, 20 L.Ed.2d 195, wherein the Supreme Court approved a statute designed for juveniles reflecting the state's specific and limited concern.

With respect to the issue of whether the material may cause anti-social conduct, by virtue of sales to the interested public, the case of *Stanley vs. Georgia*, 22 L.Ed.2d 542, decided April 7, 1969, in the Supreme Court nullifies this argument by the words of the Court which state:

"Georgia asserts that exposure to obscenity may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion."

A footnote at this point states:

"See, e.g., Chairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962); see also Jahoda, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954), summarized in the concurring opinion of Judge Frank in *United States v. Roth*, 237 F.2d 796, 814-816 (C.A. 2d Cir. 1956).

"More importantly, if the State is only concerned about literature inducing anti-social conduct, we believe that in the context of private consumption of ideas and information we would adhere to the view that 'among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law' Given the present [fol. 525] state of knowledge, the State may no more prohibit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the grounds that they may lead to the manufacture of homemade spirits."

As to the third possible argument that could be anticipated from the State in attempting to justify the extraordinary relief sought here to abate a nuisance under a statute which is alleged to be unconstitutional, we would assume that the State asserts the right to protect the individual's mind from the effects of obscenity. The Supreme Court in *Stanley vs. Georgia*, supra, stated:

"We are not certain that this argument amounts to anything more than the assertion that the state has the right to control the moral content of a person's thoughts."

A footnote at this point states:

"Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible, in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the 'consumer.' Obscenity, at bottom, is not crime. Obscenity is sin." Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Col. L. Rev. 391, 395 (1963).

"To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment."

In a 1936 case discussing the impact and permissible limitations on the exercise of *First Amendment* rights, *Herndon vs. Lowry*, 301 U.S. at page 258 the Court stated:

"The power of a state to abridge freedom of [fol. 526] speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the constitution."

In *Bantam Books vs. Sullivan*, 372 U.S. 58, the Court said:

"It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech. *Marcus v. Search Warrant of Property*, 367 U.S. 717, 730, 731, 6 L.Ed.2d 1127; 1135, 1136, 81 S. Ct. 1708.

"Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith v. California*, 361 U.S. 147, 4 L.Ed. 2d 205, 80 S. Ct. 215; *Marcus v. Search Warrant of Property (US) supra*, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. See *Near v. Minnesota*, 283 U.S. 697.

(Footnote) "Nothing in the Court's opinion in *Times Film Corp. v. Chicago*, 365 U.S. 43, 5 L. Ed. 403, 81 S. Ct. 391, is inconsistent with thy Court's traditional attitude of disfavor toward prior restraints of expression. The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional under all circumstances.

In declining to hold prior restraints unconstitutional per se, the Court did [fol. 527] not uphold the constitutionality of any specific such restraint. Furthermore, the holding was expressly confined to motion pictures."

Schneider v. Irvington, 308 U.S. at 159:

"The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state.

"Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic

institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

Terminiello v. Chicago, 37 U.S. 1:

"That is why freedom of speech ... is ... protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, [fol. 528] annoyance, or unrest ... There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

In a decision of the USDC for the E.D. of La., New Orleans Division, *Delat Books v. Cronvich*, 304 F. Supp. 662, with a panel of three Judges, two of the three constituting a majority, it was held in essence that judicially superintended adversary hearings were constitutionally required on the issue of obscenity *vel non* prior to an arrest of a book seller even when the publications were the subject of a purchase, not a seizure.

The exact language of the Court in this regard was as follows:

"Since prior restraint upon the exercise of First Amendment rights can be exerted through seizure (with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizure and arrest, the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity."

The Court went on to say:

"It is left to those states seeking to regulate obscenity to devise constitutionally acceptable procedures for the enforcement of any such regulations. However, these procedures, among others, may have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity.

"Applying these principles to the cases before us, the arrests, as well as the seizures claimed to be incident thereto, are clearly invalid for lack of a prior adversary determination of the obscenity of the materials upon which the arrests and seizures were based. The fact that in each case some materials were purchased, rather than seized, is of no [fol. 529] moment in view of the requirement of an adversary determination of obscenity prior to arrest or threat of arrest.

....

"To the extent that this contention is based upon the lack of the required procedural safeguards prior to seizure or arrest, it has been disposed of by what we have hereinabove held with respect to the necessity of an adversary judicial determination of obscenity."

In a case decided on September 19, 1969, the United States District Court for the Southern District of Georgia, Chief Judge Lawrence presiding, styled *Mike Sokolic v. Leo B. Ryan, et al*, 304 F. Supp. 213 (1969), it was stated:

"The idea that a criminal prosecution and threats or probability of further prosecutions does not chill one's First Amendment rights is judicial illusion.

That fact was recognized in *Dombrowski v. Pfister*, 380 U.S. 479. There the Supreme Court enjoined prosecutions under Louisiana's Subversive Activities Act where the statute was facially unconstitutional and where the authorities continued to prosecute under it. *Dombrowski* would not seem to apply to criminal prosecutions commenced under ostensibly valid state statutes whose constitutionality is not challenged. However, an extension of the teaching of that case has been seen in several recent First Amendment cases. In *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622, a New York District Court recognized that practices short of actual seizure of books may operate to deny constitutional rights and enjoined the defendants in a case where police officers were constantly present in the book store. In *Poulos v. Rucker*, 288 F. Supp. 305, An Alabama District Court, citing *Bantam Books v. Sullivan*, 372 U.S. 58, recognized that criminal prosecution or the threat thereof prior to an adversary determination of obscenity constitutes an unconstitutional burden upon freedom of expression. In that case, however, the controversial materials were declared to be non-obscene and it was therefore unnecessary to enjoin state prosecution.

"The most recent case appears to be *Delta Book* [fol. 530] *Distributors et al v. Cronvich et al*, (Ed. of La. No. '68-1927 and 69-322). There, Judge Boyle, speaking for a three-Judge District Court said: 'Since prior restraint upon the exercise of First Amendment rights can be exerted through seizure (with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizure and arrest, the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity.'

"The Court did not enjoin the state court but indicated its holding should be sufficient to produce the same result without a restraining order.

"I take the same course in the present case. Any criminal prosecution here prior to an adversary hearing and without plaintiff having thy subsequent opportunity to refrain from selling materials determined to be obscene is violative of his First Amendment rights. The materials seized were unconstitutionally taken. For all their filth, they must be returned to their pandering vendor. To this pass has judicial latitudinarianism brought us in the censorial field.

"What the courts have done, clumsily perhaps, is to try to strike a balance between private and public rights—the right of an individual to free, legitimate expression, on thy one hand, and, on the other, the right to the public to be free from that expression which is obscene. There is nothing to prevent diligent state prosecutors from instituting adversary proceedings before a judicial officer through notice to the distributor and a subpoena duces tecum directed to it with the name of each questionable and challenged publications. Following a judicial determination of obscenity the state authorities may seize and prosecute if the publications and materials are put on sale. And this is all the clearer where State procedures are modernized."

The Supreme Court for the State of Florida in *Reaver v. Martin Threaters of Florida*, 52 So.2d 682, had before it the [fol. 531] implimentation of injunctive relief directed against a drive-in theater and stated the following of nuisance abatement:

"Under the familiar maxim 'Sic utere tuo ut alienum non laedas,' it is well settled that a property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property which is recognized and protected by law, and so long as his use is not such a one as the law will pronounce a nuisance."

and of drive-in theaters stated:

"The operation of a drive-in theatre is not, per se, a nuisance; it is as legal a use of his premises by the defendant as is the operation of an airport by the plaintiff."

The Supreme Court for the State of New York in *Larkin v. G.I. Distributors, Inc.*, 245 N.Y.S.2d 553, similarly held that the definition of obscenity is the same whether the mode of proscription be civil or criminal. How can dissemination be proscribed as a nuisance when the publications have not been disseminated. See also *Redrup v. New York*, 386 U.S. 767.

In the more than three decades since *Near v. Minnesota*, the law has not been altered in any respect to permit the state to do by indirect means that which it could not be directly. Therefore dissemination cannot be suppressed as a nuisance when the same cannot be proscribed after dissemination. To abate as a nuisance before dissemination is nothing more than preventing the unknown for the material is precluded from the outset. As the court stated in *Near*:

"This statute, for the suppression as a nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved . . .

[fol. 532] "This suppression is accomplished by enjoining publication and that restraint is the object and effect of the statute.

"The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the state imposes an unconstitutional restraint upon publication."

Therefore based upon the holding of *Near* and the subsequent cases it is apparent that no state may constitutionally suppress publication merely upon the basis that their dissemination constitutes a nuisance.

Appellant again recites the basis for the unconstitutionality of Section 823.05 as was recited before the trial judge on page 46, 47 and 48 of the transcript of the record, and to this Court in paragraph 8 of the assignments of error.

CONCLUSION

Section 823.05 is unconstitutional on its face because it outlines standards that are impermissibly and unconstitutionally vague and broad, and for the further reason that there is no assurance of a prompt judicial decision of the question of whether the actions thereunder are a nuisance, so particularly crucial in the area of First Amendment due process.

[fol. 533]

IV. SECTION 847.011 et seq. OF THE FLORIDA STATUTES ANNOTATED IS VOID FOR VAGUENESS AND IMPERMISSIBLE OVERBREADTH IN THAT THE SAME FAILS TO SUFFICIENTLY DEFINE OBSCENITY AND THAT

IT FORBIDS OR REQUIRES THE DOING OF AN ACT IN TERMS SO VAGUE, FLUID AND INDEFINITE THAT MEN OF COMMON INTELLIGENCE MUST NECESSARILY GUESS AT THE MEANING AND DIFFER AS TO ITS APPLICATION AND THEREFORE THE AREA OF PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENT IS INVADED.

It is elementary in that the area of *First Amendment* freedoms, an overbroad and vague statute is repugnant to the constitutional provisions quaranteeing those freedoms. •

A statute is void for vagueness whenever a person of ordinary intelligence must guess at its meaning and differ as to its application, *Oertel Co. v. Glenn* (D.C. Ky.) 13 F. Supp. 651, affirmed, 97 F.2d 495; *Anderson v. Burnquist* (Minn.), 11 N.W.2d 776; *State v. Hoebel* (Wis.), 41 N.W.2d 865, and where the terms of the statute are so vague as to convey no definite meaning to those whose duty it is to execute it are likewise invalid, *State v. Morrison* (N.C.), 185 S.E. 674; *People ex rel. Duffy v. Hurley*, 85 N.E.2d 26. And of course penal statutes must necessarily have a strict construction, *U.S. v. Brown*, 33 U.S. 18. The strict construction is to be placed against the prosecution and in favor of the person accused, *Weineck v. State*, 188 MD. 172, 52 A.2d 73.

The United States Supreme Court has variously enuniated the need of removing vagueness from the penal statutes particularly in the area of *First Amendment* freedoms. In the case styled *Marcus v. Property Search Warrants*, 367 U.S. 717:

[fol. 534] "The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers involved in the

selection of such magazines as in his view constituted 'obscene . . . publications.'

"We think this case demonstrably falls within the compass of those decisions of the Court which hold that' . . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'

"The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operated to ~~inhibit~~ the exercise of individual freedoms affirmatively protected by the Constitution. As we said in *Smith v. California*, ' . . . stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.' "

Then in *Bantam Books v. Sullivan*, 372 U.S. 58:

"Our insistence that regulations of obscenity scrupulously embody the most rigorous precedural safeguards, *Smith v. California*, 361 U.S. 147, 4 L.2d 205, 80 S. Ct. 215; *Marcus v. Search Warrant of Property (US)* supra, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 84 L.Ed. 1093, 60 S. Ct. 736; *Winters v. New York*, 333 U.S. 507, 92 L.Ed. 840, 68 S. Ct. 665; *NAACP v. Button*, 371 U.S. 415, 9 L.Ed2d 405, 83 S. Ct. 328. (T)he line between speech unconditionally

guaranteed and speech which may legitimately be regulated... is finely drawn.... The separation of legitimate from illegitimate speech calls for... sensitive tools..."

and in *Baggett v. Bullitt*, 377 U.S. 360:

"As in *Cramp v. Board of Public Instruction*, (Emphasis supplied,) "(t)he vice of unconstitutional vagueness is further aggravated where, as [fol. 535] here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.' 368 U.S. 278, 287, 7 L.Ed.2d 285, 292, 82 S. Ct. 275. We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms."

The United States Supreme Court has dealt directly with state statutes regulating *First Amendment* freedoms wherein definitions were not set forth. In the case styled *Ashton v. Kentucky*, 384 U.S. 195, the Court in referring to the lack of statutory definition concluded that the definition reverted to the definition at "common law" for "criminal libel",

"Here, as in the cases discussed above, we deal with First Amendment rights.

"Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.

"We said in *Cantwell v. Connecticut* (Emphasis supplied), *supra*, that such a law must be 'narrowly drawn to prevent the supposed evil,' 310 U.S. at 307, 84 L.Ed at 1220, 128 ALR 1352, and that a

conviction for an utterance 'based on a common law concept of the most general and undefined nature', *id.*, at 308, 84 L.Ed at 1220, 128 ALR 1352, could not stand

"All the infirmities of the conviction of the common-law crime of breach of the peace as defined by Connecticut judges are present in this conviction of the common-law crime of criminal libel as defined by Kentucky judges."

Then, in *Interstate Circuit v. Dallas*, 390 U.S. 676:

"In regard to the last alternative holding, we must conclude that the court in effect ruled that the 'portrayal . . . of sexual promiscuity as acceptable,' *id.*, at 775, is in itself obscene as to children. The court also held that the standards of the ordinance were 'sufficiently definite.'

"Thus, we are left merely with the film and directed to the words of the ordinance. The [fol. 536] term 'sexual promiscuity' is not there defined . . . Nonetheless, (w)hat may be to one viewer the glorification of an idea as being 'desirable, acceptable or proper' may to the notions of another be entirely devoid of such a teaching. The only limits on the censor's discretion is his understanding of what is included within the term 'desirable, acceptable or proper.' This is nothing less than a roving commission . . ." *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. at 701, 3 L.Ed.2d at 1524 (Clark, J., concurring in result). (Emphasis supplied).

"Vagueness and the attendant evils we have earlier described, see *supra*, at 230, are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression.

"It is . . . essential that legislation aimed at protecting children from allegedly harmful expression – no less than legislation enacted with respect to adults – be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.

"The vices – the lack of guidance to those who seek to adjust their conduct and to those who seek to administer the law, as well as the possible practical curtailing of the effectiveness of judicial review – are the same.

"... Here we conclude only that 'the absence of narrowly drawn, reasonable and definite standards for the officials to follow', *Niemotko v. Maryland*, 340 U.S. 268, 271, 95 L.Ed. 267, 270, 71 S. Ct. 325 (1951), is fatal." (Emphasis supplied).

and as stated in *Bridges v. California*, 314 U.S. 252, the Supreme Court spoke of legislative intent where First Amendment freedoms are being regulated:

"Moreover, the likelihood, however great, that a substantial evil will result cannot alone justify a restriction upon freedom of speech and press. The evil itself must be 'substantial', Brandeis, J., concurring in *Whitney v. California*, supra (274 U.S. 374, 71 L.Ed. 1105, 47 S. Ct. 641); it must be 'serious', id. 376. And even the [fol. 537] expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression."

Then in *Winters v. New York*, 33 U.S. 507:

"A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press.

"... The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness', *Cantwell v. Connecticut* 310 U.S. 296, 84 L.Ed 1213, etc."

The status of the law in the State of Florida is therefore unconstitutional in the area of obscenity. The statutes themselves attempt to define a crime yet fail to define the substance constitutionally necessary to commit the criminal act. How then can men of ordinary intellect know what is proscribed? This statute therefore can be construed to mean whatever in the individual enforcement officer's judgment is obscene and for that reason invades the area of presumptively protected *First Amendment* materials.

The construction of penal statutes should be strict and the legislative draftsmen must meet the requirements of definiteness, *Sutherland Statutory Construction* (3rd. Ed.), Section 5604, 5605, and this is all the more so in the area of *First Amendment* freedoms, *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734 (1965).

The statute in question employs a definition of proscribable obscenity as:

[fol. 538] "For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."

This is a constitutionally deficient test to limit or restrict *First Amendment* freedoms.

The proper test in the determination of proscribable obscenity is:

"(a) The dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Redrup v. New York*, 386 U.S. 767.

All three of these tests must be independently determined and applied. After this application, each and everyone of the tests must coalesce before the material can be deemed obscene. *Memoirs v. Massachusetts*, 383 U.S. 413.

In *Stein v. Batchelor*, 300 F. Supp. 602 (U.S. D. Texas, Dallas Div. 1969), the Court was confronted with this identical issue and the definition of "obscenity" contained in the Texas Statute was substantially the same as the definition under the statute in question. The Court held, *inter alia*:

"The Fifth Circuit has not passed directly on the question before us but in the case of *Phelper v. Decker* the Court made this comment at page 240 on the statute before us:

"Since the Texas Statute is devoid of any language that requires a finding that the material must have no redeeming social value, it may be constitutionally suspect."

"The definition of 'obscene' in Article 527 does [fol. 539] not appear to have been construed by the Texas Courts. In this circumstance we must place our own construction on the statute."

(6) It is clear to us that the Supreme Court in Memoirs has added to the definition per se, of 'obscene' in the Roth case by including in it a provision that to be 'obscene' material must be 'utterly without redeeming social value.' Thus without such inclusion, the Texas statute is unconstitutional."

And the Court further stated:

"In view of Stanley v. Georgia, 89 S. Ct. 1243, the above section is clearly unconstitutional in so far as it makes mere possession of obscene material a crime. A difficult question remains, however, concerning the extent to which Section 1 is affected by Stanley."

*"Applying the above discussion of the scope of the Stanley decision to the present case, we conclude that Section 1 as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination. In addition to proscribing the mere possession of obscene material, Section 1 states that 'whosoever shall knowingly photograph, act in, pose for * * * print,' etc. without any limitation that such activities be engaged in publicly or with the intent to publicly or commercially distribute the materials involved. Although a number of the phrases in their normal and natural usage connote a public activity, this Court is disinclined to*

separately analyze each phase appearing in Section 1 to determine if it is constitutionally viable. In our opinion the various provisions of Section 1 are too numerous and interrelated for such an approach to be meaningful. We therefore hold that the whole of Section 1 is unconstitutional for failure to confine its application to a context of public or commercial dissemination."

In a dissenting opinion filed by Mr. Justice Stewart joined by two other justices, reflection was cast upon the definition of obscenity under the Florida Statute in question. Mr. Justice Stewart noted in *Fort v. Miami*, 389 U.S. 918:

"It is clear that the ordinance under which [fol. 540] he was convicted is unconstitutional on its face. That ordinance adopts the definition of obscenity embodied in a Florida statute.

"For the purpose of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeal to prurient interest.

"Members of this Court have expressed differing views as to the extent of a State's power to suppress 'obscene' material through criminal or civil proceedings. But it is at least established that a State is without power to do so upon the sole ground that the material 'appeals to prurient interest.'

"The Petitioner in this case was charged, tried, and convicted under a statutory provision which contains no other criterion of 'obscenity'. This conviction therefore rests upon a law incompatible with the guarantees of the First and Fourteenth Amendments of the United States Constitution."

Since the Florida Statute has incorporated a test and has failed to set forth the tests enunciated by the Supreme Court of the United States, the statute is rendered invalid for vagueness and is thereby repugnant to the freedoms guaranteed under the *First* and *Fourteenth Amendments*. As was stated in *Speiser v. Randall*, 357 U.S. 513:

“(T)he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is finely drawn.”

The interpretation of a statute to render a construction of the word “obscene” by a court such as occurred in *State v. Voshart*, supra, cannot redeem a statute that contains within its language the definition as in the case at bar. For these reasons the statute is facially deficient in the suppression of freedom [fol. 541] of expression.

The United States Supreme Court reversed the Massachusetts Supreme Court for their lack of incorporation within the *judicial construction* of obscenity the requirement that “the material is *utterly* without redeeming social value,” *Memoirs v. Massachusetts*, supra. The state court had held that a mere modicum of social value was not enough to prevent the publications from being declared obscene.

The statute in question has not been interpreted to incorporate those minimal standards required under the federal *Constitution* and the decisions of the Supreme Court.

Section 847.011 of the *Florida Statutes Annotated* is void for impermissible overbreadth in that it creates an unconstitutional presumption under Sub-Section (1) (b) that, “The knowing possession by any person of six or more identical or similar materials...coming within the provisions

of the foregoing paragraph (a) is presumptive evidence of the violation of said "paragraph," which presumption could be applied by Defendants to constitutional private possession (See *Stanely v. Georgia*, 394 U.S. 557 (1969)) as well as to commercial possession for distribution to adults only in a non-obtrusive manner not encroaching on the rights of others who wish to avoid confrontation with the adult-type materials. Said presumption permits law enforcement officials — including Defendants, to charge citizens of the State of Florida with possession of purportedly obscene materials where there is no direct evidence of any criminal speech.

Sub-Section (2) of said *Section 847.011* is further void for impermissible overbreadth because it fails to distinguish between [fol. 542] constitutionally protected personal possession and public possession of materials alleged to be obscene.

Sub-Section (5) of said *Section 847.011* is further void for impermissible overbreadth in that it does not require the prosecutor to affirmatively prove that the Defendant had actual knowledge of the contents and character of the purportedly obscene material. Sub-Section (7) of said *Section 847.011* is void for impermissible overbreadth in that the State Attorney may secure an *ex parte* temporary restraining order without notice to the person complained of and an opportunity on the part of such person to participate in such a proceeding and the suppression of presumptively protected *First Amendment* materials may be imposed pending judicial review, however protracted, and there is no assurance of prompt judicial determination of the obscenity *vel non* of such materials. See *Freedman v. Maryland*, *supra*, and *Kingsley Books, Inc. v. Brown*, 354 U.S. 436.

Sub-Section (7) (f) of said *Section 847.011* is also void for impermissible overbreadth in that it does not require the complainant to affirmatively prove "scienter" or knowledge of the character and contents of the alleged obscene materials on the part of the respondent but contains an unconstitutional presumption that after respondent is served with a summons and complaint in such a proceeding, he is "chargeable with knowledge of the contents and character" of the purportedly obscene materials. See *Morrison, et al. v. Wilson, et al*, 307 F. Supp. 196, (USDC N.D. Fla. 1969).

Therefore, it is clear that the aforesaid statutory provisions are facially unconstitutional for vagueness and impermissible [fol. 543] overbreadth and should be so declared by this court. Even assuming said statutory provisions are constitutional, the same have been unconstitutionally applied by the State of Florida, its agents, servants, employees, and attorneys, and by its courts, in a manner to obtain results that have deprived appellants of their federal and state constitutional rights. No where is there testimony in the record by a person qualified to speak on the subject that the material appeals to a prurient interest, that it is an attraction only for those who are perverted or are morbidly or abnormally curious about sex. No where is there any testimony that the material has no redeeming social value. No where is there testimony with a proper predicate laid that the materials are patently offensive because they affront contemporary community standards relating to the description or representation of sex or sexual matters. No where is there testimony that customers who purchase the materials have a perverted abnormal or morbid sexual curiosity and erotic appetite. No where is there evidence that persons have been injured and damaged by violations of Chapter 847. No where is there evidence that public order has been disrupted and

subverted by violations of Chapter 847. No where is there evidence that the State of Florida has suffered any irreparable harm. No witness testified that their morals or welfare or safety have in any way been damaged or impaired. In short, the application of Chapter 847 by the Circuit Court in and for Bay County was unconstitutional and arbitrary. It was motivated by a frustration that ignored the evidence in the record. It was an attempt by the court to adjudicate the morals of the community, when it knew full well that morals [fol. 544] cannot be legislated nor adjudicated. The exercise of the moral fiber of the community cannot be accomplished by such an arbitrary capricious and unreasonable approach. The only solution is to teach morality in the home, in the church, and in the school. Obscenity may be a sin but it is not a crime. Since the record clearly indicated that there is no invasion of privacy, no pandering, and no children involved, then clearly the statute has been applied in an unconstitutional manner even though a court might pretend that it is constitutional on its face.

The result the Circuit Court reached on the meager evidence that was placed before it in the form of a police officer's biased testimony, speaks loud and clear. Arbitrary disgust point forth from the bench in outrage because of the courts personal distaste for a subject. This is the kind of practice that leads to the burning of books in Nuremburg. It cannot be accepted that our rules, no matter how distasteful or offensive. If the public is really offended it may merely refuse to enter into these stores, refuse to buy the material at the price demanded and never view it.

Surely goodness and purity will eventually drive the sellers out of business, unless the courts misjudge the public which is probably the case. The public is not so naive or corruptible as the State of Florida maintains it is.

CONCLUSION

It is appellants' conclusion that *Section 847.011 et seq.* on the Florida Statutes Annotated is void for vagueness and [fol. 545] impermissible overbreadth in that the same fails to sufficiently define obscenity and that it forbids or requires the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to its application and therefore the area of protected expression under the *First* and *Fourteenth Amendments* is invaded.

[fol. 546]

Respectfully submitted,

/s/ Paul Shimek, Jr.

Attorney for Appellants.

Certificate of Service (omitted in printing)

[fol. 547]

In the United States District Court for the
Northern District of Florida

Pensacola Division

PCA 2224

Robert Mitchum d/b/a The Book Mart, Plaintiff,

—vs—

Clinton E. Foster, as Prosecuting Attorney of Bay County, Florida, M. J. "Doc" Daffin, as Sheriff of Bay County, Florida, and The Honorable W. L. Fitzpatrick, as Circuit Judge of the Fourteenth Judicial Circuit in and for Bay County, Florida, Defendants.

**PLAINTIFF'S BRIEF RE THIS COURT'S
JULY 22, 1970 ORDER—
Filed August 14, 1970**

Before going into the question of whether involuntary submission to the Bay County Circuit Court, hereinafter called Trial Court, or to the Florida First District Court of Appeals, hereinafter called Appellate Court, foreclosed the Plaintiff's, hereinafter called Mitchum, right to continue in this three judge court, hereinafter called Court, and the questions of abstention, declaratory relief, dismissal and related matters, it is necessary to bring into focus the chronology of this case. In a period of less than three months such vigorous and vituperative litigation has been spawned that it serves almost as its own excuse for not having prior to now eliminated the question of abstention or dismissal. The record reflects that on March 30, 1970, a complaint was filed in the Trial Court seeking an injunction without bond against Mitchum for his maintaining a nuisance, the nuisance being the selling of allegedly obscene and offensive materials at the Book Mart in Panama City, Florida. A subpoena duces tecum requiring the production of every magazine and periodical or pamphlet was issued, with three day notice of hearing, served upon an employee of Mtichum, one of the three defendants. On April 3, 1970, trial was held, the transcript of those proceedings being before this Court. At trial, 25 of the numerous magazines produced were [fol. 548] selected after examination and offered into evidence by the prosecutor, Clinton E. Foster, defendant in this Court and hereinafter called Foster, 6 of which were declared obscene, 19 of which no disposition was made but not returned by the Trial Court. On April 6, 1970, Judge Fitzpatrick issued his order declaring the 6 publications obscene, declaring the sale of these 6 publications and thousands of never viewed publications on

the premises to be a nuisance and enjoined the maintaining of any business. On April 7, 1970, that outrageous order was interlocutorily appealed to the Appellate Court. On April 9, 1970, supersedeas was denied by the Trial Court and on or about April 10, 1970, service of process was accomplished upon a second employee, Cante. On April 21, 1970, supersedeas was denied by the Appellate Court and 8 days later this suit was commenced in the Marianna Division of this Court seeking relief via a temporary restraining order preventing the enforcement of the shutdown order. On April 30, 1970, this suit was transferred to the Pensacola Division and on May 12, 1970, Judge Arnou issued a temporary restraining order preventing the enforcement of Judge Fitzpatrick's order except to the extent that it prevented the sale of material determined to be obscene in a prior adversary hearing, held pursuant to due notice. On May 27, 1970, the undersigned filed Mitchum's motion to quash in the Trial Court for insufficiency of process and insufficiency of service of process, a copy of which is hereto attached. On May 29, 1970, Judge Fitzpatrick issued an order to show cause why Mitchum and his two employees previously served should not be held in contempt of Court for violation of his April 6, 1970, order shutting down the business. The hearing was set for 1:00 P.M., June 5, 1970. On June 3, 1970, the Appellate Court heard arguments on the findings and validity of the April 6, 1970, shutdown order. At 11:30 A.M. on June 5, 1970, Judge Arnou issued another temporary restraining order, this time against Judge Fitzpatrick who had now been joined as a party. On June 19, 1970, there was another hearing before the Trial Court. Mitchum's motion to quash [fol. 549] was not argued. The two served employees appeared, but Mitchum never appeared. Six days later on June 25, 1970, the Trial Court found 80 of 228 publications to be obscene. In a hearing in which no testimony was taken on the question of obscenity, the Trial Court issued its order seizing all publications (approximately 1,600) not presented to it in

the June 19 hearing and retained without disposition 148 in evidence. On June 26, 1970, numerous motions to dissolve this Court's temporary restraining orders were filed. This Court heard arguments on the question of the dissolution of the temporary restraining order on July 16, 1970, and on that date Mitchum answered in the Trial Court reserving his federal rights under *England v. Louisiana Medical Examiners*, 375 U.S. 441, 84 S. Ct. 46, 11 L.2d 40 (1964), copies of the answer having been previously furnished to each member of this Court. On July 22, 1970, this Court dissolved the temporary restraining orders and ordered briefs concerning the question of dismissal, abstention, etc. The undersigned upon learning of the three judge court's Jacksonville decision (*Meyer v. Austin*, 69-678-Civ-J, U.S.D.C., MD, Fla., July 22, 1970), filed a motion for pre-trial conference and final hearing with intention of filing briefs on constitutionality only, all before receiving this Court's July 22, 1970, order requiring this brief.

It is clear that the nature of the litigation so far in the Trial and Appellate Courts has been preliminary, and thrust upon Mitchum, a Georgia Resident, who it is maintained has not been properly served, whose motion to quash in the Trial Court has not been argued, and who has answered subject to jurisdictional motion to quash properly reserving his federal constitutional claims in case the Trial Court determined it has jurisdiction over Mitchum. The Trial Court's orders declaring a tiny percentage of publications obscene, translated into declarations of nuisance, with massive judicial seizure followup combined with denial of supersedeas by the Trial and Appellate Courts involving litigation with Mitchum's employees (not named in this federal [fol. 550] action) are trials not submitted to nor litigated by Mitchum. Transcripts of the two previous Trial Court hearings recite an appearance by counsel and employees but never Mitchum. The chronology and the transcript of proceedings before the Trial

Court demonstrate the accelerated activity of the case requiring almost emergency like appearances resulting in defendants failure to cure properly their record on motions to quash and to require an earlier answer by Mitchum. In other words, the record reflects that Mitchum was sued on March 30, 1970, moved to quash on May 27, 1970, filed an answer on July 16, 1970, subject to the motion to quash, and reserved all of his rights under *England* supra. Answers were earlier filed on behalf of the two employees, Cantey and Ballue, without reservation under *England*, supra. In the case before this Court, however, only Mitchum is involved. Employee Cantey on July 31, 1970, was convicted of selling 10 publications in violation of §847.011 by a jury who determined in the same proceeding the obscenity of the material and his "guilt". He was sentenced to five years imprisonment or \$5,000.00 fine. In that criminal proceedings, the County Judge's Court after reviewing briefs, reading *Meyer v. Austin*, supra., and hearing arguments filed its written opinion denying Cantey's motion to dismiss on the grounds of unconstitutionality of §847.011, and found §847.011 constitutional. That decision is now being appealed directly to the Florida Supreme Court.

If this Court should now find abstention appropriate, it is clear that the litigant Mitchum has not forfeited his right to litigate his federal claims fully in this Court. See *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 1 L.Ed.2d 405 (1963). It is only after the entry of an abstention decree in a federal court prior to embroilment in a state court or at the time of a voluntary initiation of a suit in the state court prior to embroilment in a federal court that Mitchum here asserting his federal claim must make a choice. The choice is to either:

- (a) freely and without reservation submit his federal [fol. 551] claims for a decision by the Trial Court, ~~litigate~~ them there, and automatically elect to forego his right to return to this Court; or

- (b) inform the Trial Court (as he already has) that he is exposing his federal claims there only for the purpose of complying with *Government Employees Committee v. Windsor*, 353 U.S. 365, 77 S. Ct. 838, 1 L.Ed.2d 894 (1957), and that he intends, should the trial court hold against him on the question of Florida law, to return to this Court for disposition of his federal contentions in accordance with *England*, *supra*.

In *Government Employees Committee v. Windsor*, *supra*, the U.S. Supreme Court held (as construed in *England*, *supra*.) that the litigant need only inform the state court what his federal claims are, so that the state statute may be construed "in light of" those claims. Clearly Mitchum did not freely submit any of his federal claims for decision by Judge Fitzpatrick nor to any appellate court in review of Judge Fitzpatrick's decision. If anything, Mitchum was dragged into the Trial Court, and had there been any indication that Florida was going to initiate civil litigation to harass, then be rest assured that Mitchum would have won the foot race into this Court.

In any event it has never been the law that you couldn't have one question (obscenity) in a state court simultaneously with similar and other different questions (constitutionality, injunctive relief) with other ramifications in a federal court so long as neither court had reached a final decision controlling the question before the other court.

However, this is immaterial since the reservation of Mitchum has been made and his right to remain or return to this Court must be preserved to make effective the primacy of the federal judiciary in deciding questions of federal law.

Mitchum contends the reservation question should never [fol. 552] be reached for the reason that this Court simply should not abstain for a variety of reasons including the fact:

- (a) that this case cannot be disposed of on state grounds alone;
- (b) that \$847.011 and \$823.05 are not susceptible to a construction by Florida courts that would avoid or modify the federal constitutional question; and
- (c) that the seemingly controlling question of Florida law is not difficult and has previously been resolved by Florida courts which irreconcilably conflict with the federal question resolution of unconstitutionality.

Also this is a diversity case. Mitchum is a Georgia resident and the amount in controversy resulting from seizure of thousands of publications and long periods of shutdown demonstrably exceeds \$10,000.00. The complaint can be amended to reflect this additional jurisdictional ground if this Court will permit same, if it is at all necessary.

The myriads of material discussing abstention can be reduced to a few clear principals. It is essentially a discretionary doctrine not to be automatically decreed in every case, as in *NAACP v. Bennett*, 360 U.S. 471, 79 S. Ct. 1192, 3 L.Ed.2d 1375, (1959), *Baggett v. Bullitt*, 377 U.S. 360, 84 S. Ct. 1316, 12 L.Ed.2d 377, (1964). The U.S. Supreme Court has recognized that obstention often exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress and that abstention denies them that promptness of decision which in all judicial actions is one of the elements of justice. See Note, *Consequences of Abstention by a Federal Court*, 73 Harv. L. Rev. 1358, 1363 (1960). The prospect of long delay in the First Judicial District of Florida in its trial and appellate courts should alone require this Court to refuse to abstain. See *Hostetter v. Idelwild Bon Voyage Liquor Corp.*, 377 U.S. 324, 84 S. Ct. 1293, 12 L.Ed.2d 350 (1964); also *Meyer v. [fol. 553] Austin*, supra.

The judge-made doctrine of abstention should be invoked of course only in narrowly limited special circumstance and requires deference to the Florida court adjudications where the issue of the Florida law is uncertain. §§847.011 and 823.05 must be of an uncertain nature and must be obviously susceptible to a limiting construction before this Court should invoke abstention. In no event should abstention be ordered simply to give the Florida courts another "first" opportunity to vindicate a federal claim in light of their past performance. See *McNeese v. Board of Education*, 373 U.S. 668, 83 S. Ct. 1433, 10 L.Ed.2d 622 (1963).

This Court has previously considered *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L.Ed.2d 22 (1965), *Zwickler v. Koota*, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed.2d 444 (1967), and related appellate court decisions in carrying out a restricted approach to the abstention doctrine and has ruled that abstention is inappropriate in cases as are here involved where the Florida obscenity and nuisance statutes are justifiably attacked *on their face* as abridging free expression, or *as applied* for the purpose of discouraging protected activities. Also see *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed.2d 629 (1967). These two Florida statutes are also being attacked as void for *overbreadth* and they are not fairly subject to a limiting interpretation that will avoid or modify the federal constitutional problem presented, and therefore should in accordance with *Zwickler*, *supra.*, be inquired into and abstention should be decreed improper. The litigation in the Florida trial and appellate courts cannot quickly remove the federal constitutional objections that both statutes are *void for vagueness*, and therefore this Court should proceed to adjudicate the federal claims as provided for in *Baggett*, *supra.*, and *Dombrowski*, *supra.* Clearly there is no danger that this Court's decision on the constitutionality of the two statutes will work a disruption of an entire legislative scheme

of regulation except as the Florida legislative [fol. 554] scheme of regulation is suppressive of First Amendment rights. See *Hostetter*, supra.

It is necessary to discuss *Dombrowski* and its progeny and apply it to this case before concluding. The holding of *Dombrowski* was merely an extension of well established legal principals to a peculiar fact situation; it was not the establishment of any broad new legal doctrine. Viewed in the light of prior jurisprudence, the decision in *Dombrowski* that abstention was not proper was dictated by prior decisions in *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed.2d 492 (1961), *McNeese*, supra., and *Baggett*, supra. The *Dombrowski* decision to allow federal injunctive relief is not a subject of this brief but was well supported by the doctrines established in *ex parte Young*, 208 U.S. 123 (1908) and repeatedly reaffirmed by the U.S. Supreme Court through succeeding years and frequently applied to civil rights cases by lower federal courts before *Dombrowski*. Unfortunately for Mitchum's position, *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, et al.*, 38 LW 4471, (June 8, 1970), never mentioned §1983 nor *Dombrowski*. *Dombrowski* involved a facially unconstitutional statute infringing upon speech, the application of that statute for the purpose of discouraging protected activities, allegations of bad faith, and allegations of extra judicial harassment. The question of whether facial unconstitutionality accompanied by prosecution possibilities or bad faith prosecution could produce the chilling effect wasn't clear in *Dombrowski* until brought into focus by the subsequent decision in the second case of *Cameron v. Johnson*, 390 U.S. 611, 88 S. Ct. 1335, 20 L.Ed.2d 182 (1968), and the first case of *Zwickler*, supra., where it is made clear that either facial unconstitutionality accompanied by possibility of prosecution or actual bad faith prosecution could produce the chilling effect and thus merit federal intervention. In discussing abstention the court talked

about the conglomerate vagueness doctrine and talked about both vague statutes and overbroad statutes, as opposed to injunctive relief being warranted [fol. 555] only if the statute were overbroad. It seems that abstention from granting declaratory relief is improper if *either* vagueness is found or overbreadth is found and in this case, of course, both are alleged and argued. In *Zwicklar*, *supra.*, the U.S. Supreme Court Held as follows:

- (a) Federal courts are to treat the demands for declaratory judgment and injunctive relief separately.
- (b) A court may grant declaratory relief even though injunctive relief is not justified, and the fact that a prayer for declaratory relief is coupled with a prayer for injunctive relief doesn't alter the rule.
- (c) Abstention isn't proper when a state statute regulating expression is justifiably attacked as constitutionally overbroad as opposed to being merely vague, and in that case the court should grant declaratory relief even if injunctive relief is not merited.

§1983 imposes upon Federal courts a duty to give due respect to a suiter's choice of a federal forum for the hearing and decision of his constitutional claims. Abstention permits an escape from this duty only in narrowly limited special circumstances, one of which is the susceptibility of a statute to a construction by the state court that would avoid the constitutional question. In the case before the Court if the obscenity and nuisance statutes are vague (as we maintain) they can be narrowed by a construction of the Florida courts, but if the statutes are overbroad (which we also maintain), they cannot be narrowed to within constitutional limits by a single court construction. Therefore nothing is to be gained

by abstaining when a statute is justifiably attacked as being overbroad, especially when, as in this case, the attack upon the two statutes are on their face for repugnancy to the First Amendment.

Zwickler v. Boll, 270 F. Supp. 131 (W.D. Wis. 1967), affirmed 391 U.S. 353 (1968), was a case arising out of prosecutions [fol. 556] for demonstrations against the Vietnam War on the campus of the University of Wisconsin. State court prosecutions had been commenced prior to the suit in the federal court for declaratory judgment and injunctive relief. Judge Gordon ruled that the statute in question was not overbroad, that there was no bad faith showing, that there was no abuse in the application of the statute and therefore under those circumstances found that abstention was proper. Judge Fairchild simply felt that §2283 was a bar to the court's issuing any injunctive relief when the statute in question was merely vague and not overbroad. Judge Doyle, dissenting, found that the statute was *overbroad* which compelled him under *Dombrowski* and *Cameron* to vote for issuance of a declaratory judgment.

Shaw v. Garrison, 293 F. Supp. 937 (E.D. LA. 1968), affirmed 393 U.S. 229 (1968), arose out of New Orleans on the criminal trial of Clay Shaw on charges that they conspired to assassinate President Kennedy, and was a case seeking declaratory and injunctive relief from the federal court to halt prosecution. The court refused and ruled that *First Amendment rights* must be involved before *Dombrowski* can be invoked and that a claim of *bad faith prosecution* alone was not sufficient under *Dombrowski* to be an exception to abstention; it must have been alleged and shown that "the bad faith prosecution" had been brought for the purpose of continuing harassment in order to discourage plaintiff in the exercise of his First Amendment rights.

In summation *Dombrowski* and its progeny reveal:

- (a) That a federal court cannot abstain but must proceed to judgment when a statute regulating expression is attacked as overbroad and the plaintiff demonstrates that the existence of the statute is actually depriving him of some specific exercise of freedom of expression.
 - (b) If a finding of overbreadth is made the court may declare the statute unconstitutional.
- [fol. 557]
- (c) If the constitutional attack is vagueness rather than overbreadth, then abstention is improper unless the statute appears easily susceptible of rehabilitation in a single state court prosecution and the applicant is guilty of hard-core conduct that validly could be made criminal under a narrow construction of the statute:
 - (d) If the statute is found to be unconstitutionally overbroad then injunctive relief will be warranted if there is a threat of prosecution under the statute resulting in a chilling effect upon the exercise of freedom of expression. This should also mean prosecution after the date of filing of the suit in federal court. Since this Court can enjoin future proceedings if the statutes regulating expression are unconstitutional on their face, there is no logic in denying the power to enjoin pending proceedings under the same statute.
 - (e) If the statute is unconstitutionally vague then injunctive relief would lie against threatened enforcement of a vague statute regulating chilling effect. (This is still a toss-up interpretation.)

(f) Bad faith application of the statute must be based upon:

(1) threatened or actual prosecution under a statute regulating expression; and

(2) be part of a plan to harass the applicant and in fact, deter him from the exercise of First Amendment freedoms unless there is evidence he has committed a crime during that exercise.

These rules clearly apply to relief against threatened prosecutions and should apply at least to prosecutions occurring [fol. 558] after the initiation of a suit in the federal court if not to all pending prosecutions involving facially unconstitutional statutes.

In conclusion, Mitchum's position is that he never voluntarily submitted himself nor any of his federal claims to any Florida trial court. Mitchum's employees' attorney did, however, vigorously argue the federal claims of the employees served and clearly since those employees were properly before the court those federal claims might debatably be waived for failure to reserve, but only as to them. In fact, Judge Fitzpatrick's first order recites jurisdiction only as to one employee, Ballue. By the time of the second order, the second employee was served. Nowhere does the court recite jurisdiction over Mitchum, a hotly contested issue. The most that can be inferred by the presence of the undersigned on behalf of Mitchum's employees is that the Florida courts should construe the statutes in light of the claims made as to the employees before the court, and later as to Mitchum if he appears.

The undersigned must admit that he copied the caption of the Trial Court and labeled the entire caption

"Appellants." Nowhere in the entire proceeding is Mitchum ever mentioned. Since the Florida courts have jurisdiction only as to two employees, Mitchum cannot be bound by any Florida court order.

It might be a different story if Mitchum had himself initiated a law suit and carried it through to finality as those applicants in *Brown v. Chastain*, 416 F.2d 1012 (5th Cir. 1969) or *Paul v. Dade County*, 419 F.2d 10 (5th Cir. 1969); and the most recent Sheriff Bill Davis of Pensacola in *Davis v. Adams*, TCA 1616 argued and decided on July 16, 1970. Unlike any of those applicants Mitchum refuses to appear except with a timely reservation of federal claims under the Rules.

Mitchum requests that this Court not stay its hand and require him to repair unwillingly to the Florida courts for a resolution of any constitutional question, since no Florida court decision can conceivably avoid any decision involving the constitution and the amendments involved. When the rights are so [fol. 559] important as in this case and the abuse is so flagrant there can be no possible avoiding of further irritation in the state-federal relationship on the constitutionality of these statutes.

A minor question in these proceedings relates to Sheriff Daffin's appearing under subpoena without payment of a witness fee, the Sheriff being a party. The question is moot. Had the Sheriff failed to respond to the subpoena for failure to have been tendered a witness fee, then it is the undersigned who would have to show contemptuous disregard for a subpoena, a defense of which might be a failure to tender witness fee. A party is not entitled to a fee and a party's presence if desired can be accomplished with a subpoena without the necessity of paying a witness fee. This is because he is not a witness, but a party whose presence is required.

Certificate of Service. (omitted in printing).

/s/Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida
Attorney for Plaintiff

(fol. 560)

In the Circuit Court, Fourteenth Judicial Circuit
of the State of Florida, in and for Bay County
Case No. 70-292

STATE OF FLORIDA, Plaintiff

vs.

Robert Mitchum, Dave Ballue, Clarence Howard
Cantey, a business known as the Book Mart, a certain
portion of land and building located at 19 Harrison
Avenue, Panama City, Florida, and all other persons,
claiming any right, title or interest in the property
affected by this action, Defendants.

MOTION TO QUASH

COMES NOW the Defendant, Robert Mitchum, by his
undersigned attorney, in accordance with Rule 1.140(b),
FRCP, and moves that this Court quash service of process
upon Robert Mitchum and as grounds therefor, states that
there has been (a) insufficiency of process, (b) insufficiency
of service of process. The Plaintiff has failed to comply with

the Florida Rules of Civil Procedure, Chapter 48, in that a copy of process with notice of service on the person in charge of such business was not sent forthwith to Robert Mitchum, a resident of the State of Georgia, by registered mail with return receipt requested. Furthermore an affidavit of compliance with Chapter 48, Florida Statutes, has not been filed before the return day or within anytime.

Certificate of Service (omitted in printing).

/s/Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida
Attorney for Defendants.

[fol. 561]

United States District Court for the
Northern District of Florida
Pensacola Division
Case No. 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as prosecuting attorney of Bay County, Florida, M. J. "Doc" Daffin, as Sheriff of Bay County, Florida, and the Honorable W. L. Fitzpatrick, as Circuit Judge of the Fourteenth Judicial Circuit in and for Bay County, Florida, Defendants.

**NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES—Filed August 21, 1970**

Notice is hereby given that Robert Mitchum, d/b/a The Book Mart, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final order denying plaintiff's application for preliminary injunction and the dissolution of temporary restraining orders previously having been granted therein, said order of denial and dissolution having been entered in this action on July 22, 1970.

This appeal is taken pursuant to 28 U. S. C. §1253.

/s/Paul Shimek, Jr.
Attorney for Plaintiff
517 North Baylen Street
Pensacola, Florida

Certificate of Service (omitted in printing).

[fol. 563]

In the United States District Court for
the Northern District of Florida
Pensacola Division
Case No. PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

vs

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, M. J. "Doc" Daffin, as Sheriff of
Bay County, Florida, and The Honorable W. L.
Fitzpatrick, as Circuit Judge of the Fourteenth

Judicial Circuit in and for Bay County, Florida,
Defendants.

**REQUEST TO CLERK FOR
CERTIFICATION OF RECORD
Filed September 4, 1970**

COMES NOW Robert Mitchum, d/b/a The Book Mart, having filed previously his notice of appeal, now requests the Clerk of the United States District Court for the Northern District of Florida, Pensacola Division, the Court possessed of the record, to certify that part of the record commencing with the original complaint filed April 30, 1970, and terminating with the three judge Court's order of dissolution of temporary restraining orders dated July 22, 1970. The Clerk is requested to provide for the transmission of the specified portion of the record to the United States Supreme Court. The Clerk is requested to number the documents to be certified comprising the record and to transmit with them a numbered list of documents, identifying each with reasonable definiteness. Attached hereto is a list of contents the appellant feels is reasonably identified to assist the Clerk in performing his duties. Attached also is a copy of a stipulation not yet executed by all parties stipulating to the omission of certain briefs and motions filed since the three judge court's July 22, 1970 order of dissolution of temporary restraining orders. The executed stipulation will be filed as soon as completed.

Certificate of Service (omitted in printing).

[fol. 564]

/s/Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida
Attorney for Plaintiff

[fol, 565]

In the United States District Court for,
the Northern District of Florida
Pensacola, Florida
Case No. PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, M. J. "Doc" Daffin, as Sheriff of
Bay County, Florida, and The Honorable W. L.
Fitzpatrick, as Circuit Judge of the Fourteenth
Judicial Circuit in and for Bay County, Florida,
Defendants.

CONTENTS OF RECORD—Filed September 4, 1970

1. Original Complaint filed April 30, 1970, consisting of 19 page petition with 6 exhibits attached consisting of another 69 pages.
2. Judge Middlebrooks order of transferral dated April 30, 1970.
3. Docket Filed May 1, 1970.
4. Notice of hearing filed May 4, 1970.
5. Defendant Foster motion to dismiss dated and filed May 11, 1970.

6. Judge Arnow's May 11, 1970, order denying Defendant Foster motion to dismiss.

7. Judge Arnow's May 12, 1970, temporary restraining order.

8. Return of service of process against Defendants Foster and Daffin filed May 13, 1970.

9. Judge Arnow's May 13, 1970, letter to Judge Brown.

10. Plaintiff's \$1,000.00 cash bond of May 13, 1970.

11. Answer to original complaint of Defendant Foster filed May 15, 1970.

12. Defendant Daffin answer to original complaint filed May 15, 1970.

13. Judge Brown's letter to Clerk of Court with enclosure [fol.566] of *Hargrave v. McKinney* attached.

14. Judge Brown's designation of three judge court filed May 22, 1970.

15. Plaintiff's motion for leave to amend complaint and add Defendant Fitzpatrick filed June 4, 1970.

16. Plaintiff's amended complaint for temporary restraining order, preliminary injunction and permanent injunction filed June 4, 1970, consisting of 13 pages.

17. Notice of hearing for temporary restraining order filed June 4, 1970.

18. Exhibit No. 1 (Judge Fitzpatrick's order to show cause) entered into evidence on June 5, 1970, hearing.

19. Defendant Foster answer to amended complaint of June 5, 1970.

20. Defendant Foster objection to joinder of Fitzpatrick of June 5, 1970.

21. Judge Arnow's June 5, 1970, temporary restraining order restraining Judge Fitzpatrick's contempt hearings.

22. Defendant Foster notice of hearing filed June 19, 1970.

23. Plaintiff's second amended complaint for temporary restraining order, preliminary injunction and permanent injunction filed July 2, 1970 consisting of Exhibits No. 10, 11, and 12 (total of 114 pages).

24. Notice of hearing for temporary restraining order, contempt order, return of material filed July 2, 1970.

25. Defendant Daffin "Objection" filed July 8, 1970.

26. Defendant Daffin Motion to Strike filed July 8, 1970.

27. Defendant Daffin motion to dismiss filed July 8, 1970.

28. Defendant Daffin motion for order requiring payment of witness fee filed July 8, 1970.

29. Defendant Fitzpatrick motion to dismiss with 4 exhibits (A, B, D, and D) attached filed July 8, 1970.

30. Judge Arnow's July 8, 1970, order setting hearing of motions for three judge court.

• [fol. 567]

31. Judge Arnow's July 8, 1970, order granting Plaintiff leave to file supplemental complaint filed July 8, 1970.

32. Transcript of July 8, 1970, hearing on temporary restraining order filed July 10, 1970.

33. Answer of Defendant Daffin filed July 20, 1970.

34. Three judge court's order of dissolution of temporary restraining order dated July 22, 1970.

35. Plaintiff's motion for pre-trial conference and final hearing filed July 23, 1970.

36. Plaintiff's brief on the constitutionality of §847.011, 823.05 and 60.05 filed July 29, 1970.

37. Defendant Foster's motion to dismiss filed July 30, 1970.

38. Plaintiff's brief on the question of abstention and dismissal consisting of 14 pages filed August 14, 1970.

39. Defendant Daffin's brief consisting of 5 pages filed August 14, 1970.

40. Defendants Fitzpatrick and Foster's brief filed by Florida Attorney General's office August 14, 1970.

41. Plaintiff's notice of appeal to the Supreme Court of the United States filed August 21, 1970.

42. Request to clerk for certification of record filed September 4, 1970.

43. Contents of record filed September 4, 1970.

44. Three judge court's order of dismissal filed September 15, 1970.

[fol. 568]

In the United States District Court for
the Northern District of Florida
Pensacola Division
Case No. PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

vs

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, M. J. "Doc" Daffin, as Sheriff of
Bay County, Florida, and The Honorable W.
L. Fitzpatrick, as Circuit Judge of the Fourteenth
Judicial Circuit in and for Bay County, Florida,
Defendants.

STIPULATION

COME NOW the respective parties, by their attorneys,
stipulating that only that part of the record commencing with
the original complaint filed April 30, 1970, through the three
judge Court's July 22, 1970 order of dissolution of temporary
restraining order, and the notice of appeal shall constitute the
record to be certified and transmitted to the United States
Supreme Court. It is stipulated that all papers and pleadings
filed in the case since July 22, 1970, with the exception of
the papers and pleadings relating to this appeal shall be
omitted, which omission includes the following items which
shall not be transmitted to the United States Supreme Court:

1. Plaintiff's motion for pre-trial conference and final hearing filed July 23, 1970.

2. Plaintiff's brief on the constitutionality of §§ 847.011, 823.05, and 60.05, Florida Statutes, consisting of 40 pages filed July 29, 1970.

3. Defendant Foster's motion to dismiss filed July 30, 1970.

4. Plaintiff's brief on Defendant's motion to dismiss consisting of 14 pages filed August 14, 1970.

5. Defendant Daffin's brief on motions pending consisting of 5 pages filed August 14, 1970. [fol. 569]

[fol. 569]

6. Defendant Foster and Fitzpatrick's memorandum in support of the Defendant's motion to dismiss for lack of jurisdiction consisting of 159 pages filed August 14, 1970.

EXECUTED THIS day of September, 1970.

/s/ Paul Shimek, Jr.
517 North Baylen Street
Pensacola, Florida
Attorney for Plaintiff

EXECUTED THIS day of September, 1970.

/s/ Joe J. Harrell of
HARRELL, WILTSHIRE,
BOZEMAN, CLARK & STONE
201 East Government Street
Pensacola, Florida
Attorney for the Defendant,
Clinton E. Foster

EXECUTED THIS

day of September, 1970.

/s/ Mayo C. Johnston of
DAVENPORT, JOHNSTON &
HARRIS

406 Magnolia Avenue

Panama City, Florida

Attorney for the Defendant,

M. J. "Doc" Daffin

EXECUTED this

day of September, 1970.

/s/Raymond L. Marky

Assistant Attorney General

Attorney General's Office

The Capitol

Tallahassee, Florida

Co-counsel for the Defendant

Clinton E. Foster and Counsel

for the Defendant The Honorable

W. L. Fitzpatrick

EXECUTED this

day of September, 1970.

/s/Michael J. Minerva

Assistant Attorney General

Attorney General's Office

The Capitol

Tallahassee, Florida

Counsel for the Defendant

The Honorable W. L. Fitzpatrick

[fol. 570]

In the United States District Court for
the Northern District of Florida
Pensacola Division
Case No. PCA 2224

Robert Mitchum, d/b/a The Book Mart, Plaintiff,

vs.

Clinton E. Foster, as Prosecuting Attorney of Bay
County, Florida, M. J. "Doc" Daffin, as Sheriff of
Bay County, Florida, and The Honorable W. L.
Fitzpatrick, as Circuit Judge of the Fourteenth Judicial
Circuit in and for Bay County, Florida, Defendants.

ORDER OF DISMISSAL WITHOUT PREJUDICE
Filed September 15, 1970

Before Simpson, Circuit Judge, Scott and Arnou,
District Judges.

BY THE COURT:

In our order of July 22, 1970, we concluded that the recent opinion of the Supreme Court of the United States in *Atlantic Coast Line Railroad Company, Petitioner, v. Brotherhood of Locomotive Engineers, et al.*, 38 L. W. 4471, 398 U.S. 281, S.Ct. , 26 L.Ed.2d 234 (1970) rendered injunctive relief inappropriate in this case. Accordingly, we dissolved the temporary restraining orders which had previously been granted by a single judge of this panel. The matter of a declaratory judgment was reserved until after submission of further briefs.

After considerable study we are likewise of the [fol. 571] opinion that declaratory relief is not proper here. Since we

may not issue an injunction in this action, it is obvious that we are without power to give effect to any judgment which we might render adverse to the defendants in this action. Under these circumstances a declaratory judgment would be hollow, and at best an advisory opinion for some future litigation. Given this posture of the case, we think it better that we do not further complicate this troubled and confused area of the law by rendering a declaratory judgment which the court lacks power to enforce. Therefore, it is

ORDERED:

1. Plaintiff's application for a declaratory judgment is denied without consideration of the merits of such application, and this action is dismissed without prejudice.

2. The defendants are awarded judgment for their taxable costs, to be assessed by the Clerk of this Court, for which let execution issue.

DONE AND ORDERED this September 15th, 1970.

/s/Bryan Simpson
United States Circuit Judge

/s/Charles R. Scott
United States District Judge

/s/Winston E. Arnow
United States District Judge

SUPREME COURT, U. S.

Supreme Court, U.S.

FILED

OCT 20 1970

E. ROBERT SEAMER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. ~~876~~ 1

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90-27

ROBERT MITCHUM, d/b/a THE BOOK MART,
Appellant,

v.

CLINTON E. FOSTER, as Prosecuting Attorney
of Bay County, Florida, M. J. "DOC" DAFFIN,
as Sheriff of Bay County, Florida, and
THE HONORABLE W. L. FITZPATRICK,
as Circuit Judge of the Fourteenth Judicial Circuit
in and for Bay County, Florida,
Appellees.

On Appeal from the United States District Court
for the Northern District of Florida,
Pensacola Division

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The Alex. Brown & Sons Building
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Towson, Maryland 21204
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PAUL SHIMEK, JR.,
517 North Baylen Street
Pensacola, Florida 32501
Of Counsel.

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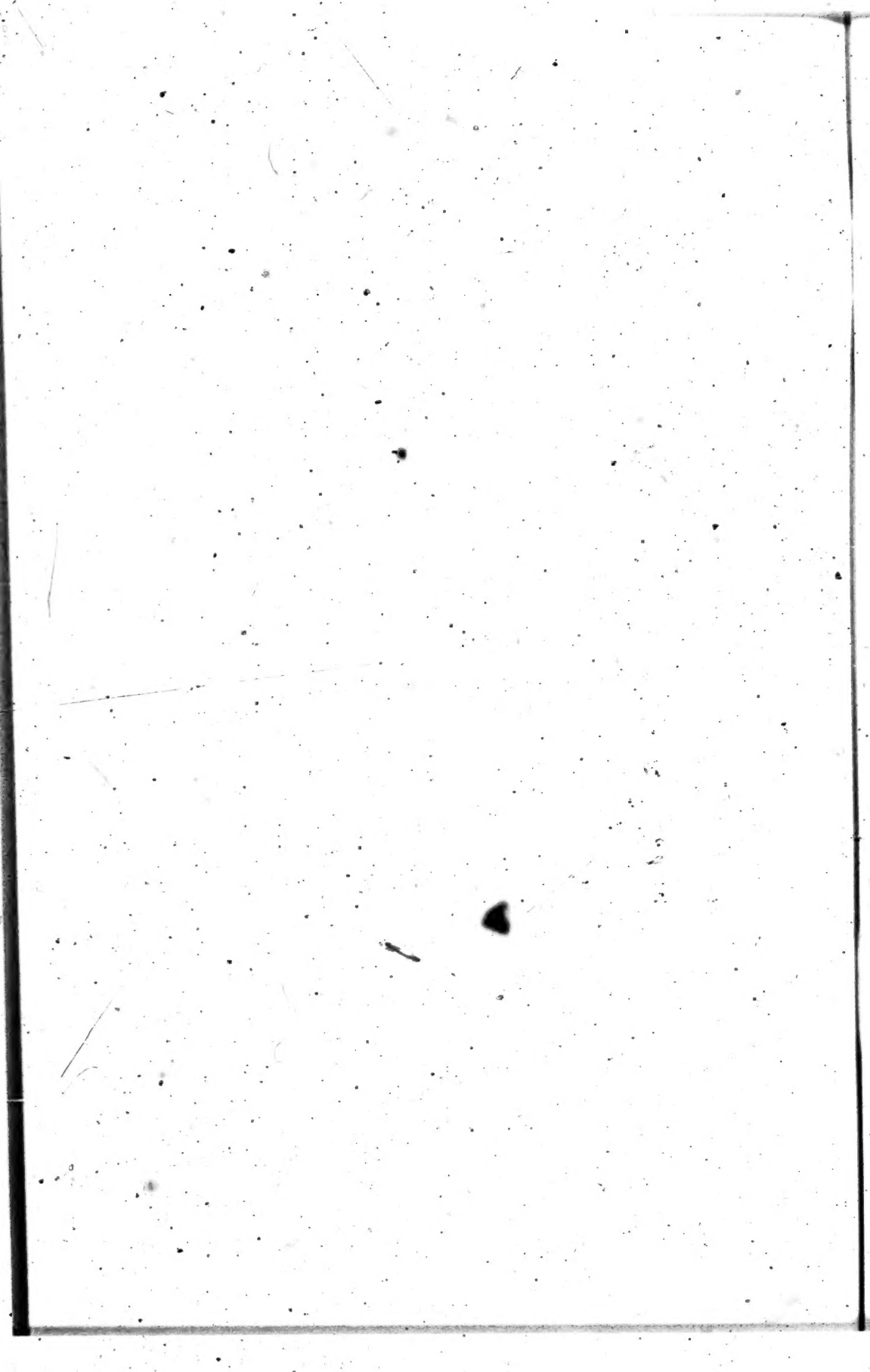
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IN THE
Supreme Court of the United States

October Term, 1970

No. _____

ROBERT MITCHUM, d/b/a THE BOOK MART,
Appellant,

v.

**CLINTON E. FOSTER, as Prosecuting Attorney
of Bay County, Florida, M. J. "DOC" DAFFIN,
as Sheriff of Bay County, Florida, and
THE HONORABLE W. L. FITZPATRICK,
as Circuit Judge of the Fourteenth Judicial Circuit
in and for Bay County, Florida,**
Appellees.

On Appeal from the United States District Court
for the Northern District of Florida,
Pensacola Division

JURISDICTIONAL STATEMENT

The Appellant appeals from the judgment of the United States District Court for the Northern District of Florida, entered on July 22, 1970, denying Appellant's application for an interlocutory injunction and granting Appellees' motions to vacate and dissolve temporary restraining orders of May 12, 1970, and June 5, 1970, and submits this statement to show

that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented. "R" refers to the certified record previously filed with this Court.

OPINION BELOW

The opinion of the District Court for the Northern District of Florida, Pensacola Division, is not reported. Copies of the opinion-order delivered upon the rendering of the judgment sought to be reviewed and earlier opinions in the same case are attached hereto as Appendix "A".

JURISDICTION

This suit was brought under the authority of the Civil Rights Act (42 U.S.C. § 1983), the Three Judge-Injunctive Relief Statutes (28 U.S.C. §§ 2281, 2284), and the Declaratory Judgments Act (28 U.S.C. § 2201). Additional Jurisdictional grounds relied upon included 28 U.S.C. § 1331, 28 U.S.C. § 1343, and Rules 57 and 65, Federal Rules of Civil Procedure.

This was a civil action seeking injunctive relief from prosecutorial harassment by the Prosecuting Attorney and the Sheriff of Bay County, Florida, and a declaration that § 847.011 and § 823.05, Florida Statutes, (the obscenity and nuisance statutes respectively) are unconstitutional. Temporary restraining orders were issued against prosecutorial officials (R. 99), and subsequently against judicial officials (R. 141).

The judgment of the three judge district court was entered on July 22, 1970, (R. 331-338), and notice of appeal was filed in that court on August 21, 1970, (R. 561).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253, there having been an order denying an interlocutory injunction in a civil action required by Congress to be heard and determined by a district court of three judges.

QUESTION PRESENTED

Where prosecutorial and judicial officials shut down a business or seize its contents on the basis of a finding of obscenity of a relatively small number of magazines contained therein, which finding of obscenity is buttressed by an arbitrary declaration and finding of nuisance, and where there had been no judicially superintended adversary hearing determining that the specific materials seized or contained within the premises are in fact obscene, and where the obscenity statute had been declared unconstitutional by another three judge court in the same State of Florida, does the Federal Anti-Injunction Statute (28 U.S.C. § 2283) prevent federal injunctive relief against state executive and judicial action where such action is in violation of the provisions of the Civil Rights Act (42 U.S.C. § 1983)?

STATUTES INVOLVED

Section 847.011 and Section 823.05, Florida Statutes, are set forth in Appendix "B" hereto.

STATEMENT

Robert Mitchum, hereinafter called Mitchum, is the owner of the sole proprietorship known as The Book Mart in the City of Panama City, Florida. He is engaged in the sale and offering for sale of books, magazines, newspapers, and the showing of films and other matters presumptively protected under the First Amendment to the Constitution of the United States. Mitchum operates his store dispensing adult-type publications in a controlled atmosphere where no sales or offerings are knowingly made to minors under the age of eighteen, where none of the material is pandered, and where ~~no invasion~~ of privacy of any individual has occurred.

Clinton E. Foster, hereafter called Foster, is the Prosecuting Attorney for Bay County, Florida. M. J. "Doc" Daffin, hereinafter called Daffin, is the Sheriff of Bay County, Florida. W. E. Fitzpatrick, hereinafter called Judge Fitzpatrick, is a Circuit Judge in and for Bay County, Florida.

On March 30, 1970, Foster filed in the Circuit Court, a court of original jurisdiction, before Judge Fitzpatrick a complaint seeking the issuance of a temporary injunction against Mitchum from the conducting or the continuing of a business of selling adult-type publications on the grounds that the business constituted a nuisance. A subpoena duces tecum was issued requiring Mitchum to present before the court on April 3, 1970 a copy of every book, magazine, periodical, and pamphlet offered for sale to the public. Numerous publications were presented, but Foster selected 25 publications and introduced them into evidence. A police officer testified that the 25 publications were obscene in his opinion and that many people wanted The Book Mart

extricated from the community. On April 6, 1970, Judge Fitzpatrick found 6 of the 25 publications to be obscene (R. 85-87). Judge Fitzpatrick also found that the conducting of the business constituted a nuisance and he issued an order enjoining and shutting down the business and effectively forbidding dissemination in its entirety. An interlocutory appeal was taken immediately to the First District Court of Appeals, hereinafter called appellate court. Both Judge Fitzpatrick and the appellate court denied supersedeas which would have stayed the order pending appeal. Mitchum unable to obtain relief then on April 30, 1970, filed a complaint in federal court seeking injunctive relief from Judge Fitzpatrick's order (R. 5-92). Winston E. Arnow, District Judge, hereinafter called Judge Arnow, issued a temporary restraining order on May 12, 1970, restraining Foster and Daffin from enforcing Judge Fitzpatrick's order except to the extent that the order prevented the sale on Mitchum's premises of any material determined to be obscene in a prior adversary judicial hearing held pursuant to due notice (R. 99). Mitchum relying on the District Court order reopened and physically removed all copies of the 6 publications previously determined by Judge Fitzpatrick to be obscene, this precluded any further sale of those materials.

On May 29, 1970, Judge Fitzpatrick issued an order to show cause why Mitchum and his employees should not be held in contempt of court for reopening the business (although the purportedly obscene material was removed) in violation of Judge Fitzpatrick's April 6, 1970, order (R. 140). Mitchum then amended his complaint seeking to join Judge Fitzpatrick as a party defendant, and to enjoin him from acting contrary to Judge Arnow's May 12, 1970, temporary restraining order. On June 5, 1970, Judge Arnow issued a

second temporary restraining order, restraining Judge Fitzpatrick from proceeding with contempt hearings on the alleged violation of reopening contrary to Judge Fitzpatrick's April 6, 1970, order. Judge Arnou also enjoined Judge Fitzpatrick from issuing any order preventing Mitchum from operating and maintaining his business provided, however, that Judge Fitzpatrick was not restrained from proceeding with scheduled contempt hearings or from enforcing or attempting to enforce any order entered by him to the extent that the hearing or enforcement concerned and dealt with the question of a distribution or sale by Mitchum at the business of publications that had been at, a prior judicial adversary hearing held pursuant to due notice, determined to be obscene (R. 141).

Subsequently on June 19, 1970, Judge Fitzpatrick held another hearing where approximately 228 publications had been subpoenaed and presented to him by Foster. No testimony as to contemporary community standards, redeeming social value, or prurient interest was presented. The 228 publications over the objection of Mitchum's counsel were presented into evidence to base such a finding. Six days later on June 25, 1970, Judge Fitzpatrick issued an order (R. 204) declaring 80 of the 228 publications to be obscene. Judge Fitzpatrick again found that the mere operation of the business was prima facie injurious and damaging to the morals and manners of the people of the State of Florida and constituted a public nuisance. Judge Fitzpatrick ratified, confirmed, and continued by his June 25, 1970, order his previous April 6, 1970, order which enjoined the operation of the entire business.

Judge Fitzpatrick also ordered a seizure of all publications offered for sale by Mitchum on the premises, ordered their impounding and enjoined and restrained Mitchum from selling or offering for sale any publication named in his order or any other publication of the same or similar character. At the time of the entry of Judge Fitzpatrick's order none of the 228 publications were located on the premises except the publications known as "Pinned No. 1", "Cover Girl 13", "Cover Girl 16", "Cover Girl 19", "Cover Girl 20", "Exciting 14", "Exciting 19", and "Gigi", all of which publications were declared by the United States Supreme Court to be not obscene in *Bloss v. Dykema*, 398 U.S. 278, 26 L Ed 2d 230, 90 S. Ct. 1727 (1970). Judge Fitzpatrick even declared "Pinned No. 1" obscene contrary to the United States Supreme Court's opinion in *Bloss v. Dykema*, supra, which opinion was handed to Judge Fitzpatrick for his review prior to his making a determination of obscenity: Judge Fitzpatrick declined to follow the holding of the Supreme Court of the United States.

Subsequently on the same day, June 25, 1970, Daffin seized every magazine, book, newspaper, film or other article for sale located on the premises, including numerous copies of the publications enumerated above (R. 211-264). Mitchum filed a motion for leave to file a supplemental complaint for relief from Judge Fitzpatrick's June 25, 1970, order which motion was granted by Judge Arnou on July 8, 1970 (R. 294). Judge Arnou also scheduled a hearing on July 16, 1970, before the three judge court panel, to hear arguments on the request for further relief sought by Mitchum and the dissolution of previous orders sought by the parties defendant.

On July 22, 1970, the three judge court entered the opinion and order appealed from (R. 331-337). The court also ordered the submission of briefs on questions of dismissal, declaratory relief, constitutionality, abstention, and related and dependent questions. Another three judge court, in *Meyer v. Austin*, No. 69-678-CIV-J, U.S.D.C., MD, Fla., on the same day, the same Circuit, Judge Simpson presiding, found § 847.011, Florida Statutes, (the obscenity statute) unconstitutional (Appendix "C").

Despite the fact that Mitchum had never been properly served and that state jurisdiction was and is still disputed (R. 560) the court dismissed the action in the belief that even declaratory relief was not proper (R. 570).

THE QUESTION IS SUBSTANTIAL

The question presented in this appeal is substantial and requires plenary consideration, with briefs on the merits and oral argument for its resolution. Two statutes are attacked, each of which on its face and as applied is an abridgment of free expression, one of which, the obscenity statute, has already been found unconstitutional. Federal injunctive relief against state court prosecutions of the nature described earlier herein is allowed under the "Expressly Authorized by Act of Congress" authorization contained in the Anti-Injunction Statute (28 U.S.C. § 2283).

On May 5, 1970, Judge Arnou felt the court could enjoin state action to preserve the constitutional right of Mitchum to sell material unless and until specified material had been determined obscene in a prior adversary judicial hearing pursuant to due notice. The court acted under the principles

enunciated in *Dombrowski v. Pfister*, 380 U.S. 479, 14 L. Ed 2d 22, 85 S. Ct. 1116 (1965), and numerous lower court decisions, and felt strongly that the state court orders involved preventing the operation of Mitchum's presumptively lawful business, and found that this constituted irreparable harm and injury and denial of constitutionally secured rights. Judge Arnow felt there was a substantial attack on the constitutionality of Florida's obscenity statute (§ 847.011) and Florida's nuisance statute (§ 823.05), which feeling is obviously shared with Judge Simpson, as to obscenity, see Appendix "C".

On June 5, 1970, the court found again that the principles of *Dombrowski*, supra, applied and that there was present irreparable harm requiring the granting of temporary relief. Three days later on June 8, 1970, this Court issued its opinion in *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, et al.*, 398 U.S. 281, 26 L. Ed 2d 234, 90 S. Ct. —, (1970). The lower court (Three Judge Court) relied heavily on *Atlantic Coast*, supra, which decision did not mention the *Dombrowski Doctrine* of whether 42 U.S.C. § 1983 would come within the "Except as Expressly Authorized by Act of Congress" language. 42 U.S.C. § 1983 must come within this language; however, if it is to be considered an exception to the prohibition of 28 U.S.C. § 2283 thereto. Since 42 U.S.C. § 1983 confers a right to sue at law or equity in federal court to redress a deprivation of federally guaranteed rights under color of law, how can 28 U.S.C. § 2283 bar injunction of state court proceedings by federal courts where the allegation is made that the state court proceedings themselves are depriving the plaintiffs of their federal civil rights? The answer should be that 28 U.S.C. § 2283 does not bar injunctions of state court

proceedings by federal courts where the state court proceedings themselves are depriving plaintiffs of their federal civil rights statutorily prescribed.

In enacting 42 U.S.C. § 1983, Congress has created a specific and uniquely federal remedy available to private citizens and opened the doors of the federal courts to dispense the remedy. This remedy is made meaningless if the federal court cannot enjoin certain proceedings in state courts which if not stayed destroys the remedy created by Congress.

In *Amalgamated Clothing v. Richman Brothers*, 348 U.S. 511 (1955), this court held that a statute could "expressly" authorize an exception to the Anti-Injunction Act even though the statute did not by its terms refer to the act (348 U.S. at 516). The Civil Rights Act (42 U.S.C. § 1983) provides for a "suit in equity", and, after all, what is a suit in equity but a request for an injunction? See also: *Dilworth v. Riner*, 343 F.2d 226 (5th Cir., 1965); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220.

An examination of the purpose sought to be achieved by the enactment of 42 U.S.C. § 1983 leads to the conclusion that it must be read as an exception to 28 U.S.C. § 2283. 42 U.S.C. § 1983 is derived almost intact from § 1 of the 1871 "Act to Enforce the Fourteenth Amendment." The Reconstruction Congresses were concerned not only with protecting the civil rights of the newly enfranchised citizenry but also with insuring that the Federal Government be given the principal responsibility for this protection. The Congresses had also passed the Thirteenth, Fourteenth, and Fifteenth Amendments, which the court said in *Strauder v. West Virginia*, 100 U.S. 303, 306-307, had a common purpose,

namely to secure rights to the recently emancipated slaves. See *Ex Parte Virginia*, 100 U.S. 339.

The legislative history of 42 U.S.C. § 1983 indicates that it was enacted to protect the rights of those newly freed and to grant them access to federal courts for the protection of those rights. See Note, *The Dombrowski Remedy - Federal Injunctions Against State Court Proceedings Violation of Constitutional Rights*, 21 Rutgers L. Rev. 92, 109-113; *Monroe v. Pape*, 365 U.S. 167, 180; *Landry v. Daley*, 288 F. Supp. 200, (N.D. Ill. 1968). If 42 U.S.C. § 1983 is not regarded as an exception to 28 U.S.C. § 2283, the statutory scheme for the protection of constitutional rights would be rendered nugatory whenever state action falling within the ban of 42 U.S.C. § 1983 took the form of a legal proceeding. A claimant alleging applicability of "the Dombrowski Doctrine" usually will not be able to present a "case or controversy" unless prosecution is threatened, and in the great bulk of the cases the threat of prosecution will not manifest itself until charges have been filed. Thus as a practical matter the Dombrowski doctrine is essentially valueless unless it may be applied to pending prosecutions in state courts. It is submitted that Judge Wisdom of the 5th Circuit was correct when he found in his concurring opinion in *Ware v. Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967) that 42 U.S.C. § 1983 was an express exception to the Anti-Injunction Act because 42 U.S.C. § 1983 represented federal interposition under the Supremacy Clause to protect individuals from state denial of their constitutionally protected rights (266 F. Supp. at 570).

Dombrowski, supra, merely extends a long standing principle of law dating back to *Ex Parte Young*, 209 U.S. 123 (1908), and including *Monroe v. Pape*, supra, *McNeese v.*

Board of Education, 373 U.S. 668, 10 L Ed 2d 622, 83 S. Ct. 1433 (1963); *Baggett v. Bullitt*, 377 U.S. 360, 12¹ L Ed 2d 377, 84 S. Ct. 1316 (1964). This is the principle of affording an extra measure of protection to the vital and sensitive freedom of expression guaranteed by the First Amendment. In essence *Dombrowski*, supra, and its progeny dictate that federal courts must not abstain, but must grant declaratory and injunctive relief against state prosecution under a statute that has an impermissible chilling effect upon the freedom of expression guaranteed by the First Amendment.

In this case the three judge court should be required to proceed to judgment since both § 847.011 and § 823.05 are attacked as overbroad, § 847.011 is unconstitutional and *Mitchum* has demonstrated that the existence of the two statutes and the state's application thereof actually deprive him of operating a book store. *Dombrowski*, supra, and the two *Zwickler* cases support this proposition (*Zwickler v. Koota*, 389 U.S. 241, 19 L Ed 2d 444, 88 S. Ct. 391 (1967); *Golden v. Zwickler*, 394 U.S. 103, 22 L Ed 2d 113, 89 S. Ct. 956 (1969)).

If the statute is unconstitutionally overbroad as alleged, then injunctive relief is warranted because there is a continuous and recurring threat and fact of prosecution resulting in a chilling effect upon the exercise of freedom of expression. Even if the statute is unconstitutionally vague then *Cameron v. Johnson*, 390 U.S. 611, 20 L Ed 2d 182, 88 S. Ct. 1335 (1968), coupled with *Baggett v. Bullitt*, supra, indicates injunctive relief would lie against enforcement of the statute regulating expression and found to have the requisite chilling effect.

In this case there is bad faith which is a plan to harass Mitchum to deter him from exercising his First Amendment freedom to sell books. Before Mitchum filed this suit at least 4 arrests of employees and 2 massive seizures of material have been set aside. Since dismissal 4 arrests resulted in a sentence of 5 years imprisonment or \$5,000.00 for an employee's sale of a total of 10 magazines on 3 separate occasions. Another was sentenced to 1-1/2 years or \$1,500.00 for the single sale of 3 magazines. For the latest arrests \$1,000.00 cash bond per magazine is required to be posted. To refuse to grant interlocutory injunctive relief under these conditions is an abuse of discretion. More than 30 lower federal court decisions involving the question whether the Anti-Injunction Act is a bar to injunctive relief under pending state proceedings have been reported since *Dombrowski*, supra. More than 1/4 of these cases presented this question to this court. The question hasn't been answered and this case seeks a decision that 42 U.S.C. § 1983 is an exception to 28 U.S.C. § 2283.

CONCLUSION

The questions presented are substantial and are entitled to plenary consideration. For all of these reasons, we believe that probable jurisdiction should be noted.

Respectfully submitted,

ROBERT EUGENE SMITH,
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102 West Pennsylvania Avenue
Towson, Maryland 21204
Counsel for Appellant.

PAUL SHIMEK, JR.,
517 North Baylen Street
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Of Counsel.

APPENDIX A.

**Notice of Appeal to the Supreme Court
of the United States**

Filed August 21, 1970

Notice is hereby given that Robert Mitchum, d/b/a The Book Mart, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final order denying plaintiff's application for preliminary injunction and the dissolution of temporary restraining orders previously having been granted therein, said order of denial and dissolution having been entered in this action on July 22, 1970.

This appeal is taken pursuant to 28 U.S.C. §1253.

/S/ PAUL SHIMEK, JR.
Attorney for Plaintiff
517 North Baylen Street
Pensacola, Florida

Proof of Service

I hereby certify that copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been furnished to Joe J. Harrell, Esquire, Attorney for Defendant, Clinton E. Foster, 201 East Government Street, Pensacola, Florida; the Honorable Raymond L. Marky, Assistant Attorney General, Attorney for Clinton E. Foster and the

State of Florida, The Capitol, Tallahassee, Florida; the Honorable Michael J. Minerva, Assistant Attorney General, Attorney for the Honorable W. L. Fitzpatrick, The Capitol, Tallahassee, Florida; and Mayo C. Johnston, Esquire, Attorney for M. J. "Doc" Daffin, 406 Magnolia Avenue, Panama City, Florida, by mail this 21st day of August, 1970.

/S/ PAUL SHIMEK, JR.

Temporary Restraining Order

Filed May 12, 1970

This cause came on to be heard on Plaintiff's application for temporary restraining order. Defendants filed motion to dismiss complaint which, after hearing, the Court denied.

Plaintiff seeks order restraining the Defendants from interfering with the operation of Plaintiff's business in Panama City, Florida, and from enforcing any orders preventing the conduct of such business without there being first held a prior judicially supervised adversary hearing declaring specific publications obscene before the enjoining of their sale.

On the undisputed facts before the Court, on March 30, 1970, Clinton E. Foster, Prosecuting Attorney for Bay County, Florida, filed in the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, hereinafter called Circuit Court, a complaint wherein he requested that Circuit Court to issue a temporary injunction without bond against the Plaintiff for the conducting or continuing of a

nuisance and from removing or in any way interfering with or mutilating the furniture, fixtures, and movable property including inventory used in the conduct of the business located at 19 Harrison Avenue, known as The Book Mart, Panama City, Florida. On April 3, 1970, pursuant to three days notice, a hearing was held wherein 25 publications were entered into evidence as exhibits before the Circuit Court. Six of the 25 exhibits presented were declared to be obscene by the Circuit Court. No determination as to the obscenity vel non of the other 19 Constitutionally presumptively protected publications was made. The order reciting the determination of obscenity of six publications was rendered on April 6, 1970, and in addition to the finding of obscenity of the six publications the Circuit Court found that the activities of the Plaintiff at 19 Harrison Avenue, Panama City, Florida, were prima facie, injurious and damaging to the morals and manners of the people of the State of Florida and were prima facie subversive to public order and decency and prima facie constituted a public nuisance. The Circuit Court issued a temporary injunction against Robert Mitchum, his agents, employees, grantees, assigns and successors from operating and maintaining any business on the premises known as 19 Harrison Avenue, Panama City, Florida, and enjoined Robert Mitchum and his agents, employees, servants, grantees, assigns and successors from removing any property or thing from or off the premises of 19 Harrison Avenue, Panama City, Florida, until further order of that court.

Plaintiff's motion for supersedeas pending determination of interlocutory appeal was denied by the trial court and also by the First District Court of Appeal of Florida.

Before this Court, it is established by uncontroverted sworn complaint that Plaintiff sells; at this location, other

materials besides those held obscene; at least on the record before this Court, that evidence was not presented in any of the state court proceedings held thus far. The state's action is brought and the state court's order entered in the suit seeking, under the Florida Statutes, abatement as a nuisance. Florida Statute 60.05 provides "injunction shall not preclude the operation of any lawful business not conducive to the maintenance of the nuisance". The constitutional right of Plaintiff to sell material unless and until it has been determined obscene in a prior adversary judicial hearing, pursuant to due notice, is now well established. See, among others, *H M H Publishing Co., Inc. v. Oldham*, 306 F. Supp. 495 (M.D. Fla. 1969), and cases therein cited. Under principles enunciated in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and its progeny, the state court order here involved preventing operation of Plaintiff's presumptively lawful business does present irreparable harm and injury, and it appears to be the kind that, in this early stage in the state court proceedings, requires the action taken by this Court in this order. The attacks on the Florida Statutes involved as being unconstitutional are serious, and not frivolous.

Accordingly, it is

ORDERED:

1. Defendants, their agents, servants, employees and attorneys, and all persons acting under their direction and control, or in active concert or participation with them, are hereby temporarily restrained from enforcing or seeking to enforce that certain order dated April 6, 1970, entered by the Circuit Court of the Fourteenth Judicial Circuit for the State of Florida, in and for Bay County, in the case styled State of

Florida, Plaintiff, v. Robert Mitchum, et al., Defendants, being Case 70-292(B), except to the extent such order prevents the sale, on Plaintiff's premises referred to therein, of any material determined to be obscene in a prior adversary judicial hearing held pursuant to due notice.

2. This order shall become effective upon the filing by Plaintiff of a good and sufficient bond in the penal sum of \$1,000.00 approved by the Clerk of this Court, conditioned that Plaintiff shall pay to Defendants the amount of any damage sustained by Defendants should it later be found this order was wrongfully issued. Unless previously revoked by the undersigned, this order shall remain in force only until the hearing and determination by the full court.

DONE AND ORDERED this 12th day of May, 1970.

/S/ WINSTON E. ARNOW
Chief Judge

Temporary Restraining Order

Filed June 5, 1970

This matter is before the Court on motion for leave to amend complaint and to add as party defendant The Honorable W. L. Fitzpatrick, in his capacity as Circuit Judge of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, as well as upon the application of plaintiff for a temporary restraining order against the additional defendant. Notice of hearing has been given.

Argument on the motion for leave to amend complaint and to add a party defendant having been heard, the Court has, by oral order entered on the record in the hearing, granted such motion, so that such person, in such capacity, is added as a party defendant.

The Court has heard argument on the question of temporary restraining order. Presented in this case is a substantial attack on the constitutionality of Florida's obscenity statute, section 847.011, and Florida's nuisance statutes, section 823.05 and 60.05. Both statutes are attacked in two respects; first, that the substantive standard by which the alleged material and activity is to be judged, i.e., whether the books are obscene and whether the maintenance of the business is a public nuisance, is so broad as to sweep within its purview not only properly regulated activities but also constitutionally protected activities; and secondly, that the same standard is so vague as to be meaningless to those whose activities are sought to be measured by that standard. In relation to the attack on the application of a Florida nuisance statute to the control of obscenity, the discussion of

"common law nuisance" in *Grove Press, Inc. v. City of Philadelphia*, 300 F. Supp. 281 (E.D. Pa. 1969) appears to be pertinent.

On the facts before the Court, it is determined the principles of *Dombrowski v. Pfister*, 380 U.S. 479 (1965) and *Sheridan v. Garrison*, 415 F.2d 699 (5 Cir. 1969), as well as principles enunciated in other and subsequent cases, including, among others, the reference to the question of contempt set forth in the case of *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 443 note 2 (1957), show there is here presented irreparable damage requiring the granting of the temporary order hereafter set forth and of such motion of plaintiff, to that extent.

It is, therefore,

ORDERED:

1. The Defendant, Honorable W. L. Fitzpatrick, as Circuit Judge of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, is hereby restrained from holding or proceeding with the contempt hearing scheduled to be held by him on June 5, 1970, as provided in his order dated May 29, 1970, in Civil Action No. 70-292(B), pending before him, and from calling or holding any other contempt hearing based upon or growing out of any alleged violation of his injunction order of April 6, 1970, entered in the suit previously referred to, or any other order that might now or hereafter be entered by him under which plaintiffs are enjoined, restrained or prevented from operating and maintaining "The Book Mart" business at 19 Harrison Avenue, Panama City, Florida, and from enforcing or

attempting to enforce any such order, provided, however, defendant is not restrained from proceeding with the scheduled contempt hearing, or any other such hearing, or from enforcing or attempting to enforce any such order entered by him to the extent such hearing or enforcement or attempted enforcement is concerned and deals with the question only of the distribution or sale by such plaintiff at such business of any publications that have at a prior judicial adversary hearing held pursuant to due notice been determined to be obscene.

2. There has been entered a prior temporary restraining order in this case under which a bond has been required to be filed by plaintiff, and the Court holds that no bond is required in connection with this order.

3. This order shall remain in force only until the hearing and determination by the full court on application for temporary injunction.

The matter will be set on such application for temporary injunction as promptly as reasonably possible by the Court, after receiving application for such hearing.

DONE AND ORDERED this 5th day of June, 1970, as of 11:30 A.M. CDT.

/S/ WINSTON E. ARNOW.
Chief Judge

Opinion – Order

Filed July 22, 1970 .

Before SIMPSON, Circuit Judge, and SCOTT
and ARNOW, District Judges.

BY THE COURT:

Before this statutory three-judge court (28 U.S.C. 2281, 2284) for decision upon argument and submission after due notice are plaintiff's application for preliminary injunction in accord with prior temporary restraining orders issued herein by Judge Arnow as a single judge, and motions of the several defendants to vacate or dissolve said temporary restraining orders.

Also presented are motions of the defendants to strike and to dismiss addressed to the amended or supplemental complaint.

The facts necessary to our determination are briefly stated. Not in dispute, they are drawn from the pleadings and admissions therein and from stipulations entered into by counsel before Judge Arnow on July 8, 1970.

In late March 1970, the defendant Foster, in his official capacity brought suit in the Circuit Court for Bay County, Florida, under that state's general nuisance statutes, Sections 823.05 and 60.05, Florida Statutes, seeking abatement as a nuisance of plaintiff Mitchum's business "The Book Mart", 19 Harrison Avenue, Panama City, Florida. The defendant Fitzpatrick on April 6, 1970, in his official capacity as Judge

of that court, granted interlocutory relief based upon the offering for sale by plaintiff of certain books determined by the state court after examination to be obscene under Section 847.011, Florida Statutes.

Review of that interlocutory order and later contempt proceedings against plaintiff thereunder is presently pending upon plaintiff's appeal before the appropriate Florida appellate court, the Florida District Court of Appeals for the First District.

After the state court had taken jurisdiction and entered its original order this suit was instituted. Judge Arnow as a single judge upon May 12, 1970 and June 5, 1970, entered temporary restraining orders directed to the state prosecuting attorney, the state circuit judge, and the executive officer of the state court, Sheriff Daffin, enjoining further proceedings in and under the state court suit. Without detailing the exact dates of entry of the competing restraining orders of Judge Arnow and the injunctive orders of the state court, it is important to note that the state court suit was brought earlier in time and that the state court had assumed jurisdiction when the instant case was commenced. Judge Arnow's restraining order of May 12 was addressed to the original state court temporary injunction and his further restraining order of June 5 was based upon and addressed to the state court contempt proceedings.

Without discussing or determining the propriety or legality of Judge Arnow's temporary restraining orders as a means of preserving the jurisdiction of this court pending presentation of the questions involved to this three-judge court, we determine that dissolution of said temporary

restraining orders is required by a significant decision rendered by the Supreme Court of the United States after Judge Arnow had acted for this court. The opinion referred to came down June 8, 1970, No. 477-October Term, 1969, *Atlantic Coast Line Railroad Company* Petitioner, *v. Brotherhood of Locomotive Engineers, et al.*, 38 L.W. 4471, ____ U.S. ____ S.Ct. ____ L.Ed. 2d ____ There in construing the anti-injunction statute first adopted by the Congress in 1793 and now carried forward through subsequent amendments as 28 U.S.C., Section 2283¹, the court quoted its pronouncement in *Amalgomated Clothing Workers of America, et al. v. Richman Brothers Co.*, 348 U.S. 511, 75 S.Ct. 452, 99 L.Ed. 600 (1955) as follows: "This is not a statute conveying a braod general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions" and proceeded:

"Since that time Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to §2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be

¹ "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." 38 L.W. 4472, 4473.

The injunctive relief sought here as to the proceedings pending in the Florida courts does not come under any of the exceptions set forth in Section 2283. It is not expressly authorized by Act of Congress; it is not necessary in the aid of this court's jurisdiction and it is not sought in order to protect or effectuate any judgment of this court.

Dealing with the "necessary in aid of its jurisdiction" exception the Supreme Court in *Atlantic Coast Line* said further:

"First, a federal court does not have inherent power to ignore the limitations of §2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is. Cf. *Amalgamated Clothing Workers v. Richman Bros.*, supra, at 519-520. This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation. Second, if the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be 'necessary in aid of' that jurisdiction. While this language is admittedly broad, we conclude

that it applies something similar to the concept of injunctions to 'protect or effectuate' judgments. Both exceptions to the general prohibition of §2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." 38 L.W. 4475

In conclusion the court in *Atlantic Coast Line* said:

"Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion." 38 L.W. 4475.

The clear applicability of *Atlantic Coast Line* to the facts here present makes unnecessary any further discussion by us of the principles involved in the interplay between state and federal jurisdictions. The temporary restraining orders are due to be dissolved, and the application for preliminary injunction must be denied. For like reasons no permanent injunctive relief is warranted. No amount of tortured reasoning by us will suffice to force the factual situation in this case as outlined above into fitting any of the statutory exceptions to the anti-injunction mandates of Title 28, U.S.C., Section 2283. Injunctive relief, either preliminary or permanent, is not available on these facts.

The court at the hearing on this matter in Tallahassee on July 16, 1970, heard argument on the motions to dismiss the

amended or supplemental complaint. The motions to dismiss were hurriedly filed and briefed in order to be considered at the July 16 hearing. Similar haste is not required in ruling upon them but we are constrained to provide a prompt and appealable ruling consonant with our views as to the availability of injunctive relief. This order will accomplish that end.

We do not contemplate requiring further argument (although we do not foreclose it) as to the motions to dismiss, but inasmuch as the complaint seeks declaratory as well as injunctive relief we consider it appropriate, before reaching a decision as to dismissal of the complaint, to call upon counsel for additional briefs in this respect. The briefs should cover the questions raised by the motions to dismiss, the complaint's prayer for declaratory relief, the applicability of the doctrine of abstention by this court during pendency of the state proceedings, and related and dependent questions. We do not foresee the necessity for reply briefs.

In consideration of the foregoing, it is

ORDERED:

1. Plaintiff's application for preliminary injunction is denied, and all further injunctive relief, preliminary or permanent, sought by the amended or supplemental complaint, is likewise denied. In this respect this order is intended to be final for all purposes, including appeal.

2. The defendants' motions to vacate or dissolve the temporary restraining orders herein of May 12, 1970 and June 5, 1970 are each granted and said temporary restraining orders are each vacated and dissolved.

3. The motion to strike from the amended or supplemental complaint reference to the defendant M. J. "Doc" Daffin "individually" is granted. *Sua sponte*, the court strikes any reference to actions of the defendants Foster and Fitzpatrick as individuals. The defendant Daffin's motion to strike paragraph 4 of the complaint is not passed upon since it is rendered moot by dissolution of the temporary restraining orders and by final refusal of any injunctive relief.

4. Ruling upon the motions to dismiss the amended or supplemental complaint interposed by the several defendants is deferred for further consideration by the court. In this connection the respective parties are directed to file and serve contemporaneous briefs on or before August 15, 1970. Four copies shall be filed with the Clerk, one for the court file and one for use of each of the three judges of this court.

Done and Ordered this 22nd day of July, 1970.

/S/ Bryan Simpson
United States Circuit Judge

/S/ Charles R. Scott
United States District Judge

/S/ Winston E. Arnow
United States District Judge

ARNOW, concurring:

Under *Atlantic Coast Line*, and its command, it is appropriate this Court now determine no permanent injunctive relief against the pending state court action is

warranted. But there is not foreclosed by this order the possibility of injunctive relief against future enforcement of either or both of the state statutes here involved by the defendant state officers, in the event this Court does not dismiss, but proceeds to give declaratory relief, with such resulting in holding of unconstitutionality of one or both of these statutes.

Order of Dismissal Without Prejudice

Filed September 15, 1970

Before SIMPSON, Circuit Judge, SCOTT
and ARNOW, District Judges.

BY THE COURT:

In our order of July 22, 1970, we concluded that the recent opinion of the Supreme Court of the United States in *Atlantic Coast Line Railroad Company, Petitioner, v. Brotherhood of Locomotive Engineers, et al.*, 38 L.W. 4471, 398 U.S. 281, ____ S.Ct. ____, 26 L.Ed.2d 234 (1970) rendered injunctive relief inappropriate in this case. Accordingly, we dissolved the temporary restraining orders which had previously been granted by a single judge of this panel. The matter of a declaratory judgment was reserved until after submission of further briefs.

After considerable study we are likewise of the opinion that declaratory relief is not proper here. Since we may not issue an injunction in this action, it is obvious that we are

without power to give effect to any judgment which we might render adverse to the defendants in this action. Under these circumstances a declaratory judgment would be hollow, and at best an advisory opinion for some future litigation. Given this posture of the case, we think it better that we do not further complicate this troubled and confused area of the law by rendering a declaratory judgment which the court lacks power to enforce. Therefore, it is

ORDERED:

1. Plaintiff's application for a declaratory judgment is denied without consideration of the merits of such application, and this action is dismissed without prejudice.

2. The defendants are awarded judgment for their taxable costs, to be assessed by the Clerk of this Court, for which let execution issue.

DONE and ORDERED this September 15th, 1970.

/S/ Bryan Simpson
United States Circuit Judge

/S/ Charles R. Scott
United States District Judge

/S/ Winston E. Arnow
United States District Judge

APPENDIX B.

FLORIDA STATUTES

Chapter 847

Obscene Literature; Profanity

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.—

(1) (a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any

advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding \$1,000.00, or both. A person who, after having been convicted of a violation of this section, thereafter violates any of its provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding \$10,000.00, or by both such fine and imprisonment.

(b) The knowing possession by any person of six or more identical or similar materials, matters, articles or things coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph.

(2) A person who knowingly has in his possession, custody, or control any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory

representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or by fine not exceeding \$500.00, or both. In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article, paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this section is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding \$10,000.00, or by both such fine and imprisonment.

(4) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

(5) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be

made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

(6) There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this section, and upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer the same shall be delivered to and held by the clerk of the court having jurisdiction to try such violation. When the same is no longer required as evidence, the prosecuting officer or any claimant may move the court in writing for the disposition of the same and after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this section, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.

(7) (a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney, county solicitor, or county prosecuting attorney in the name of the state upon the relation of such state attorney, county solicitor, or county prosecuting attorney.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. Whenever the relator state attorney, county solicitor or county prosecuting attorney shall request a judge of said court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within three days after the making of such request. No such order shall be made unless such judge shall be satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the state

attorney or county solicitor or county prosecuting attorney before the issuance of a restraining order provided for by paragraph (b) of this subsection, and there shall be no liability on the part of the state or the state attorney or the county solicitor or the county prosecuting attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

(8) The several sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorneys shall vigorously enforce this section within their respective jurisdictions.

(9) This section shall not apply to the exhibition of motion picture films permitted by former §521.02.

(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(11) For the purposes of this section, the word person includes individuals, firms, associations, corporations, and all other groups and combinations.

Chapter 823
Nuisances; Doors of Certain Buildings

Section 823.05 Places declared a nuisance; may be abated and enjoined. — Whoever shall erect, establish, continue, or maintain, own or lease any building, booth, tent or place which tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people as described in § 823.01, or shall be frequented by the class of persons mentioned in § 856.02, or any house or place of prostitution, assignation, lewdness or place or building where games of chance are engaged in violation of law or any place where any law of the state is violated, shall be deemed guilty of maintaining a nuisance, and the building, erection, place, tent or booth and the furniture, fixtures and contents are declared a nuisance. All such places or persons shall be abated or enjoined as provided in §§ 60.05 and 60.06.

APPENDIX C.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

RUSS MEYER, EVE PRODUCTIONS,
INC., JACK VAUGHAN and JACK
VAUGHAN PRODUCTIONS, INC.,
Plaintiffs,

No. 69-678-Civ-J

v.

T. EDWARD AUSTIN, as State
Attorney for the Fourth
Judicial Circuit in and for
the State of Florida, and
DALE CARSON, as Sheriff of
Duval County, Florida,
Defendants.

Judgment

Filed July 22, 1970

For reasons assigned in Judge McRae's opinion for the majority of this Court, filed herein this day, (Judge Young dissenting by separate opinion), it is

ORDERED:

1. Florida Statutes, section 847.011 (1967) is declared to be unconstitutional in its entirety, and defendants, their

employees, agents and attorneys are hereby permanently enjoined from enforcing its civil and criminal provisions.

2. The order to show cause entered herein on February 13, 1970, is discharged.

3. The transcript, with pictures, of "Vixen" is found to be irrelevant for purposes of this case, and it is ordered stricken from the amicus brief and returned to Citizens for Decent Literature, Inc.

4. Remaining issues not considered by this panel are hereby remitted to the requesting judge for such further proceedings as may be necessary.

ENTERED this 22nd day of July 1970.

/S/ Bryan Simpson,
Circuit Judge

/S/ Wm. A. McRae, Jr.,
District Judge

I dissent from the above judgment; separate dissenting opinion to be filed later.

/S/ George C. Young,
District Judge

Opinion

Filed July 22, 1970

Before SIMPSON, Circuit Judge, and McRAE
and YOUNG, District Judges.

McRAE, District Judge:

Plaintiffs have brought this action seeking injunctive, declaratory, and other relief, and in particular challenging the constitutionality of the Florida obscenity statute, section 847.011.¹ A three-judge court was convened pursuant to 28 U.S.C. §§ 1331, 1332, 1343, 2201, and 42 U.S.C. § 1983, and it finds that abstention is not appropriate because of the authoritative rulings of the Florida state courts² and because of the substantial first amendment claims raised here. *Zwickler v. Koota*, 389 U.S. 241 (1967).

The parties have stipulated to the facts relevant to the seizure of the film "Vixen" at about 3:00 P.M. on October 3, 1969. (See Appendix II). Criminal prosecution of the exhibitor following that seizure was enjoined by this Court in the case of *Mandell v. Carson*, 309 F. Supp. 326 (M.D. Fla., 1969). (temporary restraining order) because no prior adversary hearing had been obtained. A civil proceeding against the exhibitor Mandell and against the film followed in state court seeking, under section 847.011, a temporary

¹ The statute challenged, Florida Statutes, section 847.011 (1967) is attached as Appendix I.

² See sections 1-3, *infra*.

restraining order against the further showing of the film until a final determination of the state proceeding, and seeking to have the film declared obscene and to have it confiscated and destroyed. *Florida ex rel. Austin v. Mandell*, No. 69-8106-H (4th Judicial Cir. Ct., Duval Cty., Fla.). A petition for removal of that suit on diversity grounds is presently pending in this Court, No. 69-679-Civ-J (M.D. Fla.). (The state circuit court permitted the intervention of Jack Vaughan, a Georgia citizen, and Jack Vaughan Productions, Inc., a Georgia corporation, and defendant Mandell abandoned the suit).³ The present suit was filed at the same time as the petition for removal, on October 30, 1969. Subsequently, on November 17, 1969, a temporary restraining order was entered against further acts by defendants to enforce section 847.011 against the film "Vixen" pending consideration by this Court.

Plaintiff Russ Meyer is the director and producer of "Vixen" and principal stockholder and chief executive officer of plaintiff Eve Productions, Inc., owner of the print involved. Jack Vaughan is the sole stockholder and chief executive officer of plaintiff Jack Vaughan Productions, Inc., which distributes the film in Florida, Georgia, Alabama, and Tennessee. Defendant T. Edward Austin is the State Attorney for the Fourth Judicial Circuit of Florida, and defendant Dale Carson is the Sheriff of Duval County, Florida. Following the hearing, Citizens for Decent Literature, Inc., an Ohio

³ There is consequently no 28 U.S.C. § 2283 problem in this suit, since there is at present no pending state court proceeding, either civil or criminal. Thus, *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir., 1969), cert. denied, 396 U.S. 1040 (1970), are not involved in the case *sub judice*.

corporation, was permitted to file an extensive amicus curiae brief on February 13, 1970, and a supplement thereto on March 18, 1970.

Findings of Fact

In addition to the facts stipulated regarding the initial seizure without a prior adversary hearing (Appendix II), and the subsequent history of this case detailed above, it was conclusively proven at the hearing that the statewide distribution and exhibition of the film was severely "chilled" and ultimately halted as a result of the state's seizure on October 3, 1969, and the subsequent prosecutions.

At the hearing, testimony indicated that by October 3, 1969, approximately 225,000 persons had seen the film in the four-state area served by plaintiff Jack Vaughan Productions, Inc. In Jacksonville, some 23,000 persons of the age of eighteen or over had seen the film at the Five Points Theatre during the five weeks before its confiscation on October 3. Following the injunction of state prosecution, the film was shown to 7,000 additional patrons in six days. The exhibitor stated that the film rated as one of the three or four most financially successful films of the year. At the time of the Jacksonville seizure, three theatres in Miami and one in Gainesville were showing the film.

Although there had been no outright cancellations before October 3 — the date of the seizure — a four-week booking, made final only the day before, at the Florida Theatre in Tampa was cancelled on the afternoon of October 3 because of the Jacksonville seizure. Theatres in Jacksonville (besides the Mandell theatre) and Winter Park cancelled availability

play dates because of the seizure, and theatres in Daytona Beach and Key West cancelled October bookings for the reason that the film had been seized in Jacksonville and because the exhibitors did not wish to find themselves in legal difficulties. A Neptune Beach theatre did not show the film as scheduled; and three theatres in Miami cut short otherwise successful runs, and another cancelled a booking for October 16-22. A Lake City theatre was allegedly threatened with prosecution by the state's attorney and cancelled a November booking. Thus, in the entire state, only theatres in Melbourne and Cocoa Beach risked playing a full run between the seizure and the January hearing. One showing in Gainesville, begun before the hearing, finished without interruption.⁴ Subsequent attempts by plaintiffs, before the hearing, to book the film were unsuccessful, except that, at the time of the hearing, a date was scheduled to begin in late February, 1970, at four Wometco theatres in Miami. However, on February 9, Wometco cancelled with the comment "...waiting for the Jax decision." Exhibit 8 shows that as many as 34 play dates in one week were cancelled during the month of October alone. In all, at least eleven different theatres cancelled because of the seizure. The inherent flexibility of theatre booking arrangements makes it difficult to determine exactly how many play dates were lost after the month of October. In light of the apparent commercial success the film enjoyed

⁴ After the hearing, there was one showing, without interruption, of a 16 mm. print of the film at Deerfield Beach, Florida, in a sixty-seat theatre during part of February, 1970. Deerfield Beach is not within either the Middle District or the Fourth Judicial Circuit. This isolated run does not overcome the extensive chilling demonstrably attributable to the unconstitutional initial seizure and following prosecutions of the film, exhibitor, and the plaintiffs in this action. No future bookings by any theatre in the State of Florida had been made as of February 20, 1970, although one run later began, but was promptly halted by state action. See note 6 *infra*.

until October 3, however, it is reasonable to infer that the pronounced chilling effect of the prosecution caused a loss of numerous other booking opportunities after October. For the reason that interest in a film is a perishable commodity, irreparable damage may have occurred to plaintiff Russ Meyer's first amendment right of unfettered expression as creator and distributor of the film and to the other plaintiffs' constitutional rights as well.⁵ Further, it is notable that most of these cancellations were precipitated by the initial unconstitutional seizure in the criminal prosecution before the state attempted, on October 9, 1969, to proceed in a civil action by conducting a prior adversary hearing.⁶

⁵ Plaintiff Russ Meyer asserts his own first amendment right of expression as director and producer of "Vixen," the first amendment right of the public to receive protected speech (see *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)), and his rights to due process under the fifth and fourteenth amendments (both the prior adversary hearing contention and the no legitimate interest claim). Plaintiff Jack Vaughan asserts the first amendment rights of himself as distributor and of the public as recipient of protected expression, and his rights to due process. The two plaintiff corporations, Eve Productions, Inc., and Jack Vaughan Productions, Inc., may be unable to assert first amendment rights themselves, *Hague v. C.I.O.*, 307 U.S. 496, 514 (1939), but they can perhaps assert the first amendment rights of the public to receive protected expression, and without question can assert the due process contentions asserted by Meyer and Vaughan. See *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Leslie Tobin Imports, Inc. v. Rizzo*, 305 F. Supp. 1135 (E.D. Pa., 1969).

⁶ After the hearing on January 17, 1970, plaintiffs on March 11 moved the Court for an order to show cause, to add a party defendant, and to modify the temporary restraining order, alleging that a showing of the film in Gainesville beginning March 6 was stopped by a temporary restraining order issued March 10 in a civil action brought in the Eighth Judicial Circuit of Florida (which includes a portion of the Middle District), under section 847.011 against M & W Theatres, Inc., the exhibitor of a print of "Vixen" owned by the present plaintiffs. This order was allegedly issued without a prior adversary hearing and with attendant press publicity. It was further alleged that defendant Austin, state attorney for the Fourth Circuit, acted in concert with the state attorney for the Eighth Circuit, and in violation of this Court's temporary restraining order of November 17, 1969, in the present case. The hearing scheduled for March 13 was cancelled at the request of the present plaintiffs, presumably because an agreement was reached between the parties pending the release of this opinion.

Conclusions of Law

Plaintiffs claim that defendants, acting under color of the Florida obscenity statute, have severely chilled the exercise of their first amendment rights by impairing the distribution and exhibition of "Vixen" within the Fourth Judicial Circuit and elsewhere in Florida, *see, e.g.,* Note, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808 (1969), and, furthermore, make five specific challenges to the Florida statute⁷: (1) the Florida statute is unconstitutional because it authorizes seizure of matter conceived by the state to be obscene before a prior, judicially supervised, adversary proceeding is held on the question of obscenity; (2) the Florida statute is unconstitutional because, as authoritatively interpreted by Florida courts, it prescribes an inappropriate local standard for the identification of obscenity; (3) the Florida statute is unconstitutional because neither it nor any other Florida statute, rule or practice, assures a prompt final judicial determination of "obscenity" on appeal; (4) the Florida statute is unconstitutional because it is overbroad in that it does not contain the requirement that material be without redeeming social value; and (5) the State of Florida

⁷ On February 13, 1970, an order was issued to show cause why this Court should not wait until the Supreme Court decided *Batchelor v. Stein*, No. 565, 38 U.S.L.W. 3210 (U.S., Dec. 8, 1969) (prob. juris. noted), *appeal from* 300 F. Supp. 602 (N.D. Tex., 1969) (3 judge court). Except for the fourth contention, these challenges are distinct from those in *Batchelor*, and the order to show cause is accordingly discharged.

has no legitimate interest in the suppression of allegedly obscene movies, shown exclusively to adults who, though not pandered to, are first informed of the content.⁸

This Court finds the Florida obscenity statute, section 847.011, unconstitutional in its entirety for the first three contentions made by plaintiffs; the fourth claim we find to be not an unconstitutional defect, but one which it is desirable to correct if a subsequent statute should be enacted; and the Court finds it unnecessary, in light of the ruling made here, to consider plaintiffs' fifth contention at this time.

STANDING

Defendant have suggested in their trial brief, p. 16, that plaintiffs cannot claim a full measure of first amendment protection because their interests are diminished by being primarily commercial and private, instead of being personal and public, citing *Carter v. Gaudier*, 305 F. Supp. 1098 (M. D. Ga., 1969) (*denying an injunction of a pending state criminal*

⁸ These contentions are different from several that have been raised recently in other cases. The issues in the present case do not include the privacy rationale of the three-judge panel in *Byrne v. Karalexis*, No. 1149, 38 U.S.L.W. 3369 (U.S., Mar. 23, 1970) (prob. juris. noted), *appeal from Karalexis v. Byrne*, 306 F. Supp. 1363 (D. Mass., 1970); and the "right to read necessarily protects the right to receive" decision of *United States v. Thirty-Seven Photographs*, 309 F. Supp. 36 (C.D. Cal.) *appeal filed*, No. 1475, 38 U.S.L.W. 3433 (U.S., Apr. 24, 1970); *United States v. Lethe*, 7 Crim. L. Rptr. 2144 (E.D. Cal., Apr. 29, 1970). Neither is it at issue here whether criminal mens rea can be present for distribution or exhibition occurring before a prior adversary hearing determines probable cause that a film or book is obscene, or whether, in the alternative, one who sells or exhibits must do so at his own-risk. In addition, this Court has not been presented with an attack specifically on section 847.011(1)(b), although it is somewhat similar to section 847.06(2), stricken as unconstitutional in *Morrison v. Wilson*, 307 F. Supp. 196 (N.D. Fla., 1969) (3 judge court); *See Stanley v. Georgia*, 394 U.S. 557 (1969) (private possession of obscene matter constitutionally protected).

prosecution as opposed to the relief sought here, declaratory judgment). This suggestion is inapplicable to plaintiff Meyer who asserts personal first amendment rights as the creator of "Vixen." As to the other plaintiffs, it is also without merit. The Fifth Circuit Court of Appeals stated persuasively, in *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir., 1969):

.... First Amendment rights are not private rights of the appellants so much as they are rights of the general public. "Those guarantees [of speech, and press] are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." [citations omitted and emphasis added]. *Id.* at 289; Recent Decisions, 4 Ga. L. Rev. 610, 616-17 (1970).

The basis for the decision in *Carter v. Gautier*, *supra*, was that sufficient irreparable injury had not been shown to support injunctive relief against state prosecution where "private" first amendment rights were suppressed. *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir., 1969); *cert. denied*, 396 U.S. 1040 (1970); held that, where freedom of expression is threatened or suppressed, any chilling of that expression constitutes irreparable injury per se sufficient to sustain injunctive relief against a statute challenged as being unconstitutional on its face affecting free speech in a pending state criminal prosecution affecting expression. *Id.*, at 705-709. As noted in *City News Center, Inc. v. Carson*, 310 F. Supp. 1018, 1023 (M. D. Fla., 1970):

[C]ommercial parties are inextricably involved in the production and distribution of much of the information now exchanged in our society, whether by television, radio, books, or newspapers. To deny

these media standing to assert the public's interest in the free exchange of ideas and information, simply because they have a monetary interest, would be contrary to the fundamental purposes of the first amendment.

See *United States v. Alexander*, 38 U.S.L.W. 2679 (8th Cir., filed May 22, 1970). In the present case, no injunctive relief is sought involving a pending state proceeding, but only a declaratory judgment with injunctive relief from future prosecutions. We hold that plaintiffs' standing to bring this action is not diminished by their commercial interest in the film.

1. Provision for Ex Parte Injunction

Florida Statutes, Section 847.014 (7) (b) (1967), provides for the issuance of an ex parte injunction, without notice, of a threatened violation of the obscenity statute:

(7)(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. [The statute further provides that "whenever" a hearing is requested, it shall be held promptly and after due notice] . . . provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

In the present case, defendants used this ex-parte procedure initially, thereby giving plaintiffs standing to complain of the provision's unconstitutionality. Florida courts

have sanctioned the use of this subsection, e.g., *South Florida Arts Theaters, Inc. v. Florida ex rel. Mounts*, 224 So. 2d 706 (Fla. 4th D.C.A., 1969), *cert. denied*, 229 So. 2d 871 (Fla., 1969). In the pre-trial stipulation and in defendants' trial briefs, defendants expressly concede that this provision for an ex parte injunction is unconstitutional, and we so hold.⁹ E.g., *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir., 1969) (film), *cert. denied*, 38 U.S.L.W. 3222 (U. S., Dec. 15, 1969); *Metzger v. Percy*, 393 F.2d 202 (7th Cir., 1968) (film); *City News Center v. Carson*, 310 F. Supp. 1018 (M. D. Fla., 1970); *Mandell v. Carson*, 309 F. Supp. 326 (M. D. Fla., 1969) (the first order in the present case). It must be noted that a prior adversary hearing to determine whether probable cause exists for arrest or seizure is constitutionally required not to make prosecutions of obscenity difficult for the state, but rather to guard against over-zealous prosecution of protected expression. This panel, in a case heard the same day as the present one, rejected any distinction between a mass seizure of books and the seizure of a single print of a film. *Carroll v. City of Orlando*, _____ F. Supp. _____ (M. D. Fla., 1970) [No. 69-255-Orl-Civ, filed Feb. 18, 1970] (3 judge court) (Young, J. dissented), (appeal was taken to U.S. Sup. Ct., but was withdrawn Apr. 27, 1970); see, e.g., *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2d Cir., 1969), *cert. denied*, 38 U.S.L.W. 3320 (U.S., Feb. 24, 1970); *Vergari v. 208 Cinema, Inc.*, 38 U.S.L.W. 3338 (U.S., Feb. 27, 1970) (*cert. denied*). The extensive chilling caused by the seizure of a print of a film is substantiated by the facts in this case.

⁹ Although this one subsection might be severed from the remainder of the statute, see *Morrison v. Wilson*, 307 F. Supp. 196, 199 (N.D. Fla., 1969) (3 judge court); *State v. Reese*, 222 So. 2d 732 (Fla., 1969), the other contentions discussed below require holding the entire statute invalid.

where there were only six prints of the film in 1969 in the entire state.¹⁰

¹⁰ The amicus curiae brief, adopting a position abandoned by defendants, strongly urges that a prior adversary hearing is not required before the state may proceed against speech or expression by seizure or arrest, and it relies upon the Supreme Court affirmance of *Milky Way Productions, Inc. v. Leary*, 305 F. Supp. 288 (S.D. N.Y., 1969), *aff'd per curiam*, 397 U.S. 98 (1970). We view that case, despite its choice not to require a prior adversary hearing, as having been affirmed primarily because of plaintiffs' failure to seek federal injunctive relief until "a summer and beyond" had passed after the chilling of expression began, and because plaintiffs "acquiesced [from] May and June [until mid-August] in the postponement of the pending state criminal proceedings." *Id.* at 291; *cf.*, two-month delay before requesting declaratory relief in *Holden v. Arnebergh*, ____ Cal. App. 2d ____, 71 Cal. Rptr. 401 (Cal., 1968), *appeal dismissed*, 394 U.S. 102 (1969). Whatever delay has been caused in the present case has not been attributable to plaintiffs, who acted promptly and repeatedly urged a speedy conclusion to the case. Since the affirmance of *Milky Way*, the Supreme Court has affirmed, *per curiam*, *Gable v. Jenkins*, 38 U.S.L.W. 3405 (U.S., Apr. 20, 1970), *appeal from* 309 F. Supp. 998 (N.D. Ga., 1969), a decision that unequivocally requires a prior adversary hearing before seizure. In any event, *Milky Way* deals only with an arrest, and not a seizure as in the present case.

A panel of the Fifth Circuit Court of Appeals recently stated in a federal prosecution (involving a seizure of eleven books and one deck of playing cards) that the affirmance of *Milky Way* "confirms" that a prior adversary hearing is unnecessary. *United States v. Fragus*, ____ F.2d ____ [No. 27801, filed June 23, 1970], *supplementing*, 422 F.2d 1244 (5th Cir., 1970) (*per curiam*). The result and reasoning in that decision is tenable only as it holds that Fragus waived all non-jurisdictional defects by his knowing and intelligent guilty plea. Accordingly, the comments in *Fragus* about *Milky Way*, *Stanley v. Georgia*, *supra*, the constitutionality of 18 U.S.C. §1462, the lack of a prior adversary hearing before arrest or seizure, and *United States v. 37 Photographs*, *supra*, are not essential to the issues raised in that case.

In addition, the amicus brief attempts to undercut the validity of *Redrup v. New York*, 386 U.S. 767 (1967), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), on the basis of the state court decision in *Cain v. Commonwealth*, 437 S.W. 2d 769 (Ky. Ct. App., 1969); that case was reversed by the United States Supreme Court after the amicus brief was filed. *Cain v. Kentucky*, 397 U.S. 319 (1970) (*per curiam*).

2. Improper Interpretation of "Contemporary Community Standards"

Four years after the decision in *Roth v. United States*, 354 U.S. 476 (1957), the Florida Legislature adopted the *Roth* test in subsection 10 of the statute under attack here:

(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

As subsequently interpreted in *Jacobellis v. Ohio*, 378 U.S. 184, 192-95 (1964), and as stipulated by defendants to be the controlling interpretation,¹¹ the phrase "contemporary community standards" means a national standard of contemporary values. A national standard has been followed

¹¹ Defendants stipulated that *Jacobellis, supra*, dictates a national standard, but deny that the Florida courts have authoritatively ruled otherwise. The amicus brief asserts that six federal Courts of Appeals and four states have followed a national standard, that three states have adopted a statewide standard, that five states, including Florida, have retained a local community standard, and that four states are confused in what standard controls. The amicus brief relies, for support of its contention that the lack of a national standard does not present a federal question, on the recent denial of certiorari of two cases, both involving nightclub performances. *California v. Giannini*, 23 L. Ed. 2d 223 (1969); *Jones v. City of Birmingham*, 38 U.S.L.W. 3254 (U.S., Jan. 12, 1970). Even if the facts were similar to those in the case at bar, such denials do not imply a ruling on the merits. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950). The Court's opinion in *Jacobellis* should have put to rest the contentions of the amicus brief:

The Court has explicitly refused to tolerate a result whereby "the constitutional limits of free expression in the Nation would vary with state lines," . . . ; we see even less justification for allowing such limits to vary with town or county lines. (Citation omitted) *Id.* at 194-95.

by state courts outside of Florida in post-*Jacobellis* cases, e.g., *State v. Locks*, 97 Ariz. 148, 397 P.2d 949 (1964); *State v. Vollmar*, 389 S.W. 2d 20 (Mo., 1965). In two cases a local standard was used and they were reversed, for that or other reasons, by the United States Supreme Court: *Gent v. State*, 239 Ark. 474, 393 S.W.2d 219 (1965), (applying standards of Pine Bluff, Ark.), *rev'd sub. nom. Redrup v. New York*, 386 U.S. 767 (1967); *State v. Henry*, 250 La. 682, 198 So. 2d 889, 895 (1967) (applying standards of the Parish of Iberia), *rev'd per curiam*, 392 U.S. 655 (1968).

The Florida courts, however, contrary to the national standard established in *Jacobellis*, have authoritatively construed the *Roth* "community" to be a local or countywide area, and federal courts must accept the state view of a state statute. *Kingley, International Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684 (1959).

In pre-*Jacobellis* cases, the Third District Court of Appeals approved a holding that "contemporary community standards" meant the "standards in Dade County." *Gerstein v. Pleasure Was My Business*, 136 So. 2d 8, 9 (Fla. 3d D.C.A., 1962), and affirmed a decree applying such standards, *Tralins v. Gerstein*, 151 So. 2d 19 (Fla. 3d D.C.A., 1963). The latter case was reversed, per curiam, by the United States Supreme Court. *Tralins v. Gerstein*, 378 U.S. 576 (1964).

After *Jacobellis*, the Florida courts continued to construe the statute to mean only local standards. In *Felton v. City of Pensacola*, 200 So. 2d 842, 848 (Fla. 1st D.C.A., 1967), the court held that the standards were those of the City of Pensacola:

[T]he test of obscenity recognized in the Roth case, supra, is whether "to the average person, applying contemporary community standards" the dominant theme of the material taken as a whole appeals to prurient interest. *Certainly the judge of the Municipal Court of the City of Pensacola is in a much better position than the members of this court to know the "contemporary community standards" prevailing in the said city, where the alleged offenses took place. Id. at 848. (emphasis added).*¹²

The Supreme Court of Florida denied certiorari, *Felton v. City of Pensacola*, 204 So. 2d 210 (Fla., 1967), and the United States Supreme Court reversed, per curiam, on March 11, 1968. *Felton v. City of Pensacola*, 390 U.S. 340 (1968).

That reversal *non obstante*, and despite the issue being squarely presented to him, see Brief of Appellants, filed July 5, 1967, pp. 12-13, (Exhibit 11, in evidence), the same judge, on July 11, 1968, held that "contemporary community standards" were the standards of Escambia County (which includes the City of Pensacola):

The judge of the Court of Record was, under our law, the trier of facts, and we have no authority to substitute our judgment for his on questions of fact, even if we wished to. Observation of this rule is particularly important here, because *the test of obscenity depends upon community standards, and*

¹² This statement demonstrates the difficulty of review where the standards are not articulated or proven. It is contended in *Batchelor v. Stein*, No. 565, 38 U.S.L.W. 3205 (Dec. 9, 1969) (prob. juris. noted), that the standards of "redeeming social value" must be pleaded and affirmatively proven by the prosecution. Here we consider only whether the standard is local or national, not whether it must be pleaded and proven by the state.

the judge and other citizens of the community are better equipped to know those standards than appellate judges living far away.

Along with the judge, 18 citizens of Escambia County saw the film and testified as to their reactions to it. *Nissinoff v. Harper*, 212 So. 2d 666, 668 (Fla. 1st D.C.A., July 11, 1968).

The Supreme Court of Florida denied certiorari, *Nissinoff v. Harper*, 221 So.2d 747 (Fla., 1968), and no appeal was taken, for in the fifteen months between the trial decree and the appellate decision the theatre burned down, making the case moot. Affidavit of Alan H. Rosenbloum, Exhibit 12.

The constitutional necessity for a national, as opposed to a local, standard is apparent not only because "[i]t is, after all, a national constitution we are expounding." *Jacobellis v. Ohio*, *supra*, at 195, but also because of the unevenness of censorship permitted by a local standard, making criminal to show in one part of the state, or of the nation, that which is legal in another (an equal protection rationale), and because of the inevitable consequence of chilling the dissemination of protected expression (a first amendment basis). Moreover, this national standard is not a national "average" of permissibility that would result in half of the nation being brought under the more repressive standards of the other half, thereby depriving that public of access to expression permitted in their own locale. Although the contours of the national standard may be imprecise, the first amendment guarantee is a fundamental one that protects interstate (and intrastate) expression from the vagaries of local censorship and political opportunism.

Since the statute has been interpreted in a manner contrary to the Supreme Court's ruling in *Jacobellis*, and the

state has persisted in that interpretation, we do not find evidence of sufficient willingness by the state courts to change their view so as to be in accord with *Jacobellis*, and therefore we decline to abstain from holding the statute unconstitutional. Moreover, a contrary ruling by this Court to the position the Florida courts have taken would not necessarily be followed by them.¹³

3. Failure of the State to Provide for Prompt Appellate Consideration

Although section 847.011(7)(b), (c), provides for an expedited trial procedure to minimize incursions on the right of protected expression, the statute makes no provision whatever for an expedited appellate consideration by the District Courts of Appeal, the courts of final jurisdiction in most cases. Because no prompt review is specified by law, an unwarranted delay can occur before a final decision is reached, and during that delay the evanescent right of freedom of expression may be lost.

The appeal procedure is vitally related to freedom of speech, for in Florida either party in a civil censorship proceeding may appeal. The state has recently taken such appeals from lower court rulings. *E.G.*, *State ex rel. Hallows v. Reeves*, 224 So. 2d 285 (Fla., 1969); *State v. Reese*, 222

¹³ For example, the First District Court of Appeal recently upheld the Jacksonville vagrancy ordinance despite a three-judge district court's decision striking the substantially similar Florida vagrancy statute as unconstitutional. *Lazarus v. Faircloth*, 301 F. Supp. 266 (S.D. Fla., 1969) (3 judge court), appeal taken, No. 630, 38 U.S.L.W. 3225. The Florida court stated: "A decision of a Federal District Court, while persuasive if well reasoned, is not by any means binding on the courts of a state." *Brown v. City of Jacksonville*, No. M-488 (Fla. 1st D.C.A., filed June 9, 1970).

So. 2d 732 (Fla., 1969) (reinstating two criminal informations which had been dismissed by the trial judge on the grounds that section 847.011 failed to prescribe a sufficiently ascertainable standard of guilt). An adverse ruling by the trial court may mean that speech will be chilled until it is vindicated on appeal. On the other hand, the citizen whose expression is found to be protected by the circuit court may, nonetheless be chilled by the unresolved prosecution for whatever period the state's appeal consumes. Florida Appellate Rule 5.12 provides that no supersedeas bond is required of the state unless required by court order. Thus, an initial civil finding that the material is not obscene does not protect further expression during an appeal taken by the state. For instance, in this case, the chilling effect was demonstrated in exhibitor Mandell's testimony that he would not risk showing the film until after a successful appeal, regardless of whether he won or lost at the trial level.¹⁴

In the recent past, appeals from trial decision in Florida obscenity cases have consumed inordinate lengths of time. Docket sheets in evidence trace the slow progress of two decisions by the First District Court of Appeal: *Felton v. City of Pensacola*, 200 So. 2d 842 (Fla. 1st D.C.A., 1967), *cert. denied*, 204 So. 2d 210 (Fla., 1967), *rev'd per curiam*, 390 U.S. 340 (1968); *Nissinoff v. Harper*, 212 So. 2d 666 (Fla. 1st D.C.A., 1968), *Cert. denied*, 221 So. 2d 747 (Fla., 1968) (right of petition to United States Supreme Court mooted by theatre fire during appeal).

¹⁴ "Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality." *Freedman v. Maryland*, 380 U.S. 51 (1965).

In *Felton*, after the trial court entered its judgment on February 28, 1966, the District Court of Appeal docketed the appeal for oral argument two months and two days after appellants' briefs were submitted. It rendered its decision eight months and four days after oral argument. The appellate decision, on July 6, 1967, came more than one year and four months after the trial court entered its judgment.

In *Nissinoff*, the trial court entered its judgment on March 14, 1967, the arguments before the District Court of Appeal were set only after two months and six days had elapsed after all briefs were submitted, and the court rendered its decision on July 11, 1968, more than one year and three months after the trial court entered its judgment, and it denied rehearing on August 14, 1968. The theatre burned down before a petition for writ of certiorari could be made to the United States Supreme Court.

The unnecessary and unconstitutional chilling effect of this delay in the appeals is apparent from the *Felton* and *Nissinoff* cases, both begun and decided after the United States Supreme Court had established that any censorship process must provide for a "prompt final judicial decision." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965). In *Freedman*, it was stated:

Risk of delay is built into the Maryland procedure, as is borne out by experience; in the only reported case indicating the length of time required to complete an appeal, the initial judicial determination has taken four months and *final vindication of the film on appellate review, six months. Id.*, at 55 (emphasis added and citation omitted).

The State of Maryland subsequently amended its statute to require advanced hearings on appeal. In a case brought in Maryland after amendment, the final judicial determination, including appellate review, came in less than three months. *Trans-Lux Distr. Corp. v. Maryland State Board of Censors*, 240 Md. 98, 213 A.2d 235 (1965). After a Dallas ordinance was similarly invalidated for failure to provide for a speedy review, *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906 (N. D. Tex., 1965), the ordinance was amended to require the censorship board to waive all statutory notice of appeal and times for appeal, to file its brief in ten days, and to request advanced consideration by the appeals court. A subsequent appellate decision was reached in less than two months, on April 5, 1966, after the case had been initially filed on February 14, 1966. *Interstate Circuit, Inc. v. City of Dallas*, 402 S.W. 770 (Tex. Civ. App., 1967), *rev'd on other grounds*, 390 U.S. 676 (1968). Apart from the ordinance's concern only with viewing by juveniles under sixteen years of age, the shortness of the appellate proceeding in that case accounts for the Supreme Court's language which seems to indicate that a speedy trial is all that is constitutionally required. *Id.*, at 690 n. 22. That footnote itself refers to the Supreme Court's decision in *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-42 (1968), which quoted *Freedman, supra*, at 58-59, with emphasis: "[T]he procedure must also assure a

prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." (emphasis by the Supreme Court).¹⁵

In deference to the wide choice of acceptable procedures that the Legislature might devise to protect the right of free expression while an appeal is being taken, we decline to prescribe what specific procedures must be used.

4. Failure of the Statute to Include a Statement of the Memoir Test

It was asserted in the complaint and argued in post-hearing memoranda that the Florida statute is constitutionally defective because, on its face, it is overbroad for failure to include the additional *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), requirement for obscenity that the material be without socially redeeming value. Plaintiffs also

¹⁵ The defendants contend that the state statute cannot be held defective for failure to provide for a speedy appeal because the federal customs statute, 19 U.S.C. §1305, does not provide for a speedy appeal. See *United States v. One Carton Positive Motion Picture Film Entitled "491"*, 367 F.2d 889, 898-904 (1966). A review of such cases reveals that in some of them imported material was released pending review, *United States v. One Book Entitled "The Adventures of Father Silas"*, 249 F. Supp. 911 (S.D. N.Y., 1966), or in others the importers caused the delay, e.g., *United States v. A Motion Picture Entitled "Pattern of Evil"*, 304 F. Supp. 197 (S.D. N.Y., 1969); *United States v. A Motion Picture Entitled "I Am Curious-Yellow"*, 285 F. Supp. 465, 469 (S.D. N.Y., 1968), rev'd 404 F.2d 196 (2d Cir., 1968). In the customs cases, federal courts are given the latitude to construe and apply the statute in obedience to the dictates of *Freedman v. Maryland*, supra. See *United States v. A Motion Picture Entitled "Pattern of Evil"*, supra, at 200; *United States v. 392 Copies of a Magazine Entitled "Exclusive"*, 253 F. Supp. 485 (D. Md., 1966), aff'd, 373 F.2d 633 (4th Cir., 1967), rev'd sub nom. *Central Magazine Sales v. United States*, 389 U.S. 50 (1967), but federal courts cannot save a state statute by a similar construction where the evidence conclusively demonstrates that the state courts have chosen not to comply with *Freedman*.

contend, with some force, that the recent decision of the Florida Supreme Court, upholding section 847.011, in *State v. Reese*, 222 So. 2d 732 (Fla., 1966), does not guarantee that the *Memoirs* modification of *Roth* will be read into the statute as the "majority" opinion in *Reese* purports to do. The *Reese* court's opinion was concurred in by all six members of the court, but three of them specially concurred, stating that, in their opinion, the post-*Roth* pronouncements by the United States Supreme Court (and particularly the *Memoirs* addition) provided no clear modification of *Roth*, and possessed "no dignity as . . . judicial precedent." Furthermore, they stated that the "redeeming social value" test was merely so much "hocus-pocus. [sic]" *Id.*, at 738. Although if this attitude were to prevail there would be little assurance that constitutionally guaranteed expression would be protected, we will accept the "majority" opinion of the court and presume that the Florida courts would have interpreted the Florida obscenity law in light of the *Memoirs* standards. A similar confidence in the Florida courts was stated by *Morrison v. Wilson*, 307 F. Supp. 196 (N.D. Fla., 1969) (3 judge court), in its construction of a companion obscenity statute, section 847.06. If a revised statute is enacted, the addition of the *Memoirs* test is but one of several modifications that should be made so that adequate notice is given in the statute of the standards to be applied. See *The Great Speckled Bird v. Stynchcombe*, 298 F. Supp. 1291 (N. D. Ga., 1969).

5. The State of Florida Has No Interest in Preventing Forewarned Adults, Absent Pandering, from Deciding for Themselves What Films They Wish to See.

Plaintiffs assert that the State of Florida has no interest in preventing adults, who are forewarned of the film's contents, absent pandering, from choosing what they may see, citing *Stanley v. Georgia*, 394 U.S. 557 (1969); *Karalexis v. Byrne*, 306 F. Supp. 1363 (D. Mass., 1970), *prob. juris*, noted, *Byrne v. Karalexis*, No.1149, 38 U.S.L.W. 3369 (U.S., Mar. 23, 1970); see *Roth v. United States*, 354 U.S. 476, 510-11 (1957) (Douglas, J. dissenting). Considerable commentary has recently been evoked by this position. Engdahl, *Requiem for Roth: Obscenity, Doctrine is Changing*, 68 Mich. L. Rev. 185 (1969); Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Column L. Rev. 391 (1963); Morreale, *Obscenity: An Analysis and Statutory Proposal*, 1969 Wis. L. Rev. 421; *The Supreme Court*, 1968 Term, 83 Harv. L. Rev. 7, 147-54 (1969); Note, *Obscenity and the Law: An Appraisal of the Contemporary Concept of Obscenity*, 1 Seton Hall L. Rev. 99 (1970); Comment, *Stanley v. Georgia: New Directions in Obscenity Regulation*, 48 Tex. L. Rev. 646 (1970); see Katz, *Free Discussion v. Final Decision: Moral and Artistic Controversy and the Tropic of Cancer Trials*, 79 Yale L.J. 209 (1969); Krislov, *From Ginzberg to Ginsberg: The Unhurried Children's Hour In*

Obscenity Litigation, 1968 Sup. Ct. Rev. 153. In light of the ruling that is made here, it is unnecessary to reach this contention at this time.¹⁶

Not reached by this ruling is Florida Statutes, section 847.012 (1967), prohibiting sale or distribution of obscenity to persons under eighteen years of age. See *Ginsberg v. New York*, 390 U.S. 629 (1968). Nor does this decision reach the question of the alleged obscenity of the film which, for the reasons underlying this decision, the Court has found it unnecessary to witness; and the transcript with pictures of the film is therefore irrelevant and it ordered stricken from the amicus brief and returned to Citizens for Decent Literature, Inc.

This Court is keenly mindful that pornographic films and publications, often devoid of redeeming social or literary value, are being distributed throughout this state and nation. This problem should perhaps receive study and appropriate constitutional action by Congress and the legislatures.

¹⁶ Plaintiffs seem, in essence, to argue that no rational basis has been shown for the state to exclude any expression from forewarned adults in the absence of pandering. See Henkin, *Morals and the Constitution: The Sin of Obscenity*, *supra*. This due process contention (fourteenth amendment) differs in origin from the privacy rationale of *Karalesis v. Byrne*, or *Stanley*, *supra* (grounded in the first, fourth, and perhaps ninth amendments, and applied to the states through the fourteenth amendment's due process clause). Recent decisions in other areas may lend collateral support to the privacy argument. *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex., 1970) (consensual sodomy protected under first amendment); *Babbitt v. McCann*, 310 F. Supp. 293 (E.D. Wis., 1970) (3 judge court) (holding unconstitutional state abortion statute as invasion of woman's privacy); See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

A separate order consistent with the above will be entered simultaneously with this opinion, remitting the remaining questions of fact and damages not considered here to the requesting judge.

Judge Young dissents by separate opinion.

DONE AND ENTERED this 22nd day of July 1970.

/s/ Bryan Simpson
Circuit Judge

/s/ Wm. A. McRae, Jr.,
District Judge

/s/ George C. Young,
District Judge

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Supreme Court, U.S.

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Supreme Court of the United States

OCTOBER TERM, 1970

NO.

~~876~~

90-27

ROBERT MITCHUM, d/b/a THE BOOK MART,

Appellant,

-vs-

CLINTON E. FOSTER, as Prosecuting
Attorney of Bay County, Florida, M. J.
"DOC" DAFFIN, as Sheriff of Bay County,
Florida, and THE HONORABLE W. L.
FITZPATRICK, as Circuit Judge of the
Fourteenth Judicial Circuit in and for
Bay County, Florida,

Appellees.

MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. _____

ROBERT MITCHUM, d/b/a
THE BOOK MART,

Appellant,

-v-

CLINTON E. FOSTER, as
Prosecuting Attorney of
Bay County, Florida,
M. J. "DOC" DAFFIN, as
Sheriff of Bay County,
Florida, and THE HONORABLE
W. L. FITZPATRICK, as
Circuit Judge of the
Fourteenth Judicial
Circuit in and for Bay
County, Florida,

Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees in the above-entitled case
move to dismiss or affirm on the grounds
that the question presented is so unsub-
stantial as not to need further argument.

STATEMENT OF THE CASE

This suit was instituted in the United States District Court, Northern District of Florida, by the filing of a complaint for preliminary injunction, permanent injunction, declaratory judgment, damages and convocation of a three-judge court.

(Document No. 1) Plaintiff asked the federal court to restrain the defendants Clinton E. Foster, as Prosecuting Attorney of Bay County, Florida, and M. J. "Doc" Daffin, as Sheriff of Bay County, Florida, from enforcing the Florida obscenity statute (§847.011) and from enforcing two Florida nuisance statutes (§§823.05 and 60.05). It was plaintiff's

contention that said statutes were being used by the defendants for suppressing certain materials protected under the First Amendment and that said statutes should be declared unconstitutional as written and/or as applied. Paragraph 8 of the complaint alleged that defendant Foster had filed a complaint in the circuit court of Bay County, Florida, asking the state circuit judge (W. L. Fitzpatrick) to issue a temporary injunction to enjoin the conducting of a nuisance at the business located at 19 Harrison Avenue, Panama City, Florida, known as the Book Mart. Plaintiff further alleged, in paragraph 9, that after a hearing in the state court, Judge Fitzpatrick had found that a nuisance existed and had issued a temporary injunction enjoining plaintiff's business; and a copy of that order was attached to the complaint. Paragraph 10

alleged that a stay of Judge Fitzpatrick's order had been sought in the First District Court of Appeal of Florida but that the court had denied the motion.

Plaintiff also sought declaratory relief, asking that a three-judge court be convened and to rule that Section 847.011, Florida Statutes, was unconstitutional.

The cause was heard by United States District Judge Winston Arnow who issued a temporary restraining order against the defendants, ordering them not to enforce or seek to enforce the temporary restraining order entered by Judge Fitzpatrick on April 6, 1970 "except to the extent such order prevents the sale . . . of any material determined to be obscene in a prior adversary judicial hearing held pursuant to due notice." (Document No. 7)

On May 22, 1970, an order was filed designating a three-judge panel to hear the cause.

On June 3, 1970, plaintiff moved for leave to amend the complaint and to add as a party defendant Circuit Judge W. L. Fitzpatrick. (Document No. 13) The amended complaint alleged that Judge Fitzpatrick had entered an order seeking to hold the plaintiff in contempt for operating his business in violation of Judge Fitzpatrick's prior restraining order, which according to plaintiff was "clearly in conflict with" Judge Arnow's restraining order. (Document No. 13, p. 2)

Therefore, plaintiff asked Judge Arnow to enter an appropriate order "setting aside and vacating" (Id. at p. 3) Judge Fitzpatrick's order and that Judge Arnow further restrain Judge Fitzpatrick from taking any other action against plaintiff. Judge Arnow issued a temporary restraining order on June 5, 1970 and also granted plaintiff's motion to amend the complaint and add Judge Fitzpatrick as a party defendant. Judge Arnow stated in his order that:

"On the facts before the Court, it is determined the principles of Dombrowski v. Pfister, 380 U. S. 479 (1965) and Sheridan v. Garrison, 415 F. 2d 699 (5 Cir. 1969), as well as principles enunciated in other and subsequent cases, including, among others, the reference to the question of contempt set forth in the case of Kingsley Books, Inc. v. Brown, 354 U.S. 436, 443 note 2 (1957), show there is here presented irreparable damage requiring the granting of the temporary order hereafter set forth and of such motion of plaintiff"

(Document No. 17, page 2)

Judge Arnow thereupon restrained Judge Fitzpatrick from proceeding with a contempt hearing scheduled in the state court and also enjoined Judge Fitzpatrick from holding any other contempt hearing arising out of any alleged violation of the April 6, 1970 temporary injunction (Judge Fitzpatrick's order).

On June 8, 1970, this court issued its opinion in Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970), and based upon that decision each of the defendants filed motions to vacate the temporary restraining orders.

These motions were argued before Judge Arnow on June 26, 1970. Before the court ruled, the plaintiff filed an amended complaint for temporary restraining order, preliminary injunction and permanent injunction. (Document No. 25) Included in said pleadings was a prayer that Judge Arnow hold Judge Fitzpatrick and the other defendants in contempt for violation of his June 5 restraining order. It was alleged that Judge Fitzpatrick had held a hearing and on June 25, 1970 had ruled that 80 of the 228 publications presented at the hearing were obscene; that he had ruled the operation of the Book Mart was damaging to the manners and morals of the people of the State of Florida and constituted a public nuisance causing irreparable harm; and that he had ratified and confirmed his April 6, 1970 order.

On July 8, 1970, Judge Arnow held another hearing on plaintiff's motions. At that hearing, defendants Fitzpatrick and Foster filed a motion to dismiss alleging, inter alia, that the court lacked jurisdiction because the plaintiff had taken appeals from both of Judge Fitzpatrick's prior orders (April 6 and June 25) to the First District Court of

Appeal of Florida and that plaintiff was actively litigating his federal claims in the state court. It was urged that by submitting his federal claims to the state courts, without reservation, plaintiff had deprived the United States District Court of jurisdiction subsequently to adjudicate those same claims in this suit; and as authority defendants cited this court's decision in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). Attached to the motion were copies of the assignments of error which the plaintiff (Mitchum) had filed in the state court raising the federal claims therein. (Document No. 31)

Judge Arnow then ruled that the matter should be presented to a three-judge court and therefore he withheld ruling on all the pending motions except to grant plaintiff's motion to file a supplemental complaint.

Thereafter, the matter came on for hearing before the three-judge court. On July 22, the Court entered the order appealed, denying plaintiff's request for injunctive relief. The essence of the order was that since it was uncontroverted that the state court suit was "brought earlier in time and . . . the state court had assumed jurisdiction" before the federal suit had commenced, the federal court was without authority to enjoin the state court proceedings because of the bar of the anti-injunction statute, 28 USC, Section 2283. (Document 36) The court relied on the intervening decision of Atlantic Coast Line Railroad

Company v. Brotherhood of Locomotive Engineers, supra, in interpreting the provisions of the anti-injunction statute and said:

"The injunctive relief sought here as to the proceedings pending in the Florida courts does not come under any of the exceptions set forth in Section 2283. It is not expressly authorized by Act of Congress, it is not necessary in the aid of this court's jurisdiction and it is not sought in order to protect or effectuate any judgment of this court."

QUESTIONS PRESENTED

POINT I

WHETHER THE COURT WAS CORRECT IN DENYING INJUNCTIVE RELIEF BECAUSE THE ANTI-INJUNCTION STATUTE PRECLUDED A STAY OF PREVIOUSLY INSTITUTED AND PENDING STATE COURT PROCEEDINGS.

POINT II

WHETHER THE COURT WAS CORRECT IN DENYING RELIEF FOR THE ADDITIONAL, UNSTATED, REASON THAT THE PRIOR SUBMISSION BY PLAINTIFF OF HIS FEDERAL CLAIMS TO THE STATE COURT, WITHOUT RESERVATION, DEPRIVED THE FEDERAL COURT OF JURISDICTION

SUBSEQUENTLY TO ADJUDICATE THOSE
SAME CLAIMS.

ARGUMENT

POINT I

The Anti-Injunction Statute Bars a Stay

As shown in the statement of the case herein and the order appealed, it was uncontroverted that the state court proceedings had commenced before the appellant first sought relief in the federal court. State Judge Fitzpatrick issued the temporary injunction on April 6, 1970; the appellant filed his federal suit April 30, 1970; and Federal Judge Arnow issued his first restraining order on May 12, 1970. The effect of Judge Arnow's first temporary injunction, directed to the state prosecutor and Sheriff, was to prevent taking advantage of the order of the state court. This court has recognized that the bar of the anti-injunction statute cannot be circumvented by enjoining the parties from availing themselves of a state court order. Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U. S. 281, 287 (1970). The second injunction was directed, more pointedly, to the state judge himself and the proceedings in the state court.

Whatever doubt may have existed when Judge Arnow issued the order of June 5, this court's decision in Atlantic Coast

Line Railroad Company v. Brotherhood of Locomotive Engineers, supra, the following Monday (June 8) settled against the appellant the contention that Section 2283 of 28 U.S.C. is a statute of comity. Significantly, Judge Arnow cited Sheridan v. Garrison, 415 F. 2d 699 (5th Cir. 1969) in his June 5th restraining order. In Sheridan, the Fifth Circuit had held that the anti-injunction statute was not jurisdictional but was merely a rule of comity. In the Atlantic Coast Line case this court emphatically rejected that contention saying:

"The respondent here has intimated that the Act [§ 2283] only establishes a 'principle of comity,' not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention."

Moreover, in Atlantic Coast Line, this court reaffirmed the principle that Section 2283 is a statement of legislative policy expressed in a "clear-cut prohibition qualified only by specifically designed exceptions [citation omitted] . . . and any injunction against the state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions" set forth in Section 2283. 398 U. S. at 287.

The three-judge court held that the relief sought as to the Flo. State court proceedings would not come under any of the exceptions set forth in Section 2283.

The implicit holding of the court, therefore, was that an action under Section 1983 of Title 42, U. S. Code, (Civil Rights Act) is not an express exception to the anti-injunction statute.

This court has never expressed an opinion on this precise point. In Cameron v. Johnson, 390 U.S. 611, 613 n. 3 (1968) the court observed that the three-judge court below held that Section 1983 is not an exception to Section 2283 and said:

"We find it unnecessary to resolve [that] . . . question and intimate no view whatever upon the correctness of the holding of the District Court.

However, in addition to the decision of the three-judge court in Cameron v. Johnson, 262 F. Supp. 873 (3-judge court, S. D. Miss. 1966) other federal courts have said that §1983 is not an express exception. E. g., Baines v. City of Danville, 337 F. 2d 579 (4 Cir. 1964); Hemsley v. Myers, 45 Fed. 283 (Cir. Court Kan. 1891); Brooks v. Briley, 274 F. Supp. 538 (3-judge court, M. D. Tenn. 1967), affirmed 391 U.S. 361; Sexton v. Barry, 223 F. 2d 220 (6th Cir. 1956). This issue is before this court again in

Samuels v. Mackell, Case No. 7, October Term 1970; and Fernandez v. Mackell, Case No. 9, October Term 1970.

In the absence of an explicit ruling, the three-judge court below was correct in interpreting Atlantic Coast Line as a harbinger of an inevitable decision by this court that §1983 is not an express exception to §2283. Any other result would dislodge the fundament of Atlantic Coast Line's rationale, and be irreconcilable with those portions of that opinion stating:

"[A]ny injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to §2283 if it is to be upheld. Moreover, since the statutory prohibition against such injunctions in part rests upon the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction." 398 U.S. at 287 (Emphasis added)

"Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine

the controversy." Id. at 297.

Appellant nevertheless has argued that §1983 of 42 U.S.C. is an express exception because in that statute Congress conferred jurisdiction on the federal courts to adjudicate federal civil rights in a "suit in equity," and that this general grant of equity jurisdiction, including within it injunctive power, constitutes "express" authorization to enjoin state court proceedings. Appellant relies on Landry v. Daley, 288 F. Supp. 200 (3-judge court, N.D. Ill. 1968) in which the court said (without citations of authority) that "an express exception has often-times been found by implication." Id. at 222. This reasoning is no longer tenable, since Atlantic Coast Line states that injunctions against state court proceedings "otherwise proper under general equitable principles" must be based on a specific statutory exception, and that those exceptions should not be enlarged by "loose statutory construction." 398 U.S. at 287. By fabricating an express exception from a grant of general equity jurisdiction, aided by "implication," the court in Landry failed two of the stringent tests of construction establish for §2283 by this court.

In addition, appellant urges that § 1983 should be an exception because of the federal nature of the rights sought to be protected. Again, this reasoning can be traced to Landry v. Daley, supra, and again this court's prior rulings militate against appellant's position.

In Amalgamated Clothing Workers of America v. Richman Bros., 348 U. S. 511 (1955), the court refused to find an exception to §2283, even though the federal court had exclusive jurisdiction over the subject matter of the dispute (labor case), and, as here, it was contended that the state court proceedings themselves were an obstacle to the enforcement of federal rights. This court said however:

"The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the 'gap' complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of §2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts

between state and federal courts."
348 U.S. at 518.

Accordingly, the fact that federal rights are involved does not justify enjoining the state court proceedings in which those rights are being litigated.

Particularly aggravating in this case is that appellant asked the federal district court to "vacate and set aside" the order of the state trial judge. Again, Atlantic Coast Line is pertinent because it points out that federal district courts do not have appellate jurisdiction over state courts. Only this federal court has the authority to review the legal correctness of a state court order.

The appellant contends here that it was necessary to seek injunctive relief in the federal court because the state trial court and state appellate court both denied his motions for a stay pending appeal. On this point, this court clearly spoke in Atlantic Coast Line saying (398 U.S. at 296):

"Again, lower federal courts possess no power whatever to sit in direct review of state court decisions. If the union was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the Florida appellate courts and ultimately, if necessary, in this Court. Similarly if, because

of the Florida Circuit Court's action, the union faced the threat of immediate irreparable injury sufficient to justify an injunction under usual equitable principles, it was undoubtedly free to seek such relief from the Florida appellate courts, and might possibly in certain emergency circumstances seek such relief from this Court as well. Cf. *Natural Gas Co. v. Public Serv. Comm'n*, 294 U. S. 698 (1935); *United States v. Moscow Fire Ins. Co.*, 308 U. S. 542 (1939); *R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court* §441 (*R. Wolfson & P. Kurland* ed., 1951). Unlike the Federal District Court, this Court does have potential appellate jurisdiction over federal questions raised in state court proceedings, and that broader jurisdiction allows this Court correspondingly broader authority to issue injunctions "necessary in aid of its jurisdiction."

Thus, the appellant could have sought review of the Florida state court decisions in this Court which, unlike federal district courts, possesses potential appellate jurisdiction.

Therefore, appellees urge that Section 1983 is not an express exception to Section 2283, and the lower court was correct in issuing its order denying injunctive relief in this case. Neither of the other

two exceptions (the "necessary in aid of jurisdiction," nor the "protect or effectuate judgment" exception) can be found here, and the lower court so held.

POINT II

The Federal Court lacked jurisdiction over the cause

Alternatively, the lower court was correct for a reason not specified in its order, but which was advanced in the motion to dismiss filed by appellees Foster and Fitzpatrick on July 8, 1970. (Document No. 31)

That motion attached as exhibits the notice of interlocutory appeal and assignments of error filed by Mitchum in the First District Court of Appeal of Florida. These appeals were from each of the two prior orders of Judge Fitzpatrick entered on April 6, 1970 and May 29, 1970. Both of those orders were the subject of the pleadings filed by Mitchum in the federal court. The assignments of error unmistakably show that Mitchum was litigating the same federal claims in both the state appellate court and the federal district court. As previously stated, the state litigation preceeded the filing of the federal suit and the litigation of the federal claims in the state court by Mitchum was without notice or reservation of federal claims. In this situation, the federal court lacked jurisdiction

under this court's decision of England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 419 (1964) which held that:

"[I]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then--whether or not he seeks direct review of the state decision in this Court--he has elected to forego his right to return to the District Court."

Appellees thus contend that on the basis of England, supra, the denial of injunctive relief, as well as the ultimate dismissal of the action, was correct.

CONCLUSION

Appellees therefore contend that the decision of the three-judge court was clearly correct and this appeal should be dismissed or, in the alternative, the decision below affirmed without the necessity of further briefs or argument.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

~~NO. 876~~

70-27

ROBERT MITCHUM, d/b/a THE BOOK MART,
Appellant,

v.

**CLINTON E. FOSTER, As Prosecuting Attorney of
Bay County, Florida; M.J. "DOC" DAFFIN, as
Sheriff of Bay County, Florida; and THE
HONORABLE W.L. FITZPATRICK, as Circuit Judge
of the Fourteenth Judicial Circuit in and for Bay
County, Florida,**

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

APPELLANT'S BRIEF

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970
NO. 876

ROBERT MITCHUM, d/b/a THE BOOK MART,
Appellant,

v.

**CLINTON E. FOSTER, As Prosecuting Attorney of
Bay County, Florida; M.J. "DOC" DAFFIN, as
Sheriff of Bay County, Florida; and THE
HONORABLE W.J. FITZPATRICK, as Circuit Judge
of the Fourteenth Judicial Circuit in and for Bay
County, Florida,**

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

APPELLANT'S BRIEF

Opinions Below

The memorandum opinion on July 22, 1970 (App. 308-314), of the United States District Court for the Northern District of Florida and the order dissolving the temporary restraining order is reported at 315 F. Supp. 1387

and the memorandum opinion on September 15, 1970 (App. 512-513), of that Court denying declaratory relief and granting dismissal is not as yet reported.

Jurisdiction

The judgment of the three-judge District Court of the Northern District of Florida dissolving the temporary restraining order, issued by His Honor, Judge Arnou, was entered on July 22, 1970 (App. 308-314). The judgment of the three-judge District Court denying declaratory relief and dismissing the action brought by Robert Mitchum was entered on September 15, 1970, (App. 512-513). A notice of appeal to this Court was filed in that Court on August 21, 1970, (App. 503).

The jurisdiction of this Court to review that decision conferred by 28 U.S.C. 1253, there having been an order denying injunctive relief in a civil action required by Congress to be heard and determined by a District Court of three judges.

On May 3, 1971 this Court noted probable jurisdiction.

Questions Presented

1. Does the *Federal Anti-Injunction Statute, Title 28, U.S.C. Section 2283*, bar injunctive relief against state executive and judicial action where there is a denial of constitutional freedoms in violation of the provisions of *Title 42, U.S.C., Section 1983 (Civil Rights Act)* and where a disseminator of *First Amendment* materials is forbidden to continue dissemination under an arbitrary finding of obscenity

of a small amount of publications and of nuisance thereby producing great and immediate irreparable injury through bad faith enforcement of state laws.

Statutory Provisions Involved

Section 847.011, Florida Statutes Annotated provides:

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty

(1) (a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind,

giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding \$1,000.00, or both. A person who, after having been convicted of a violation of this section, thereafter violates any of its provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding \$10,000.00, or by both such fine and imprisonment.

(b) The knowing possession by any person of six or more identical or similar materials, matters, articles, or things coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph.

(2) A person who knowingly has in possession, custody, or control any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent

immoral use, or purporting to be for indecent or immoral use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or by fine not exceeding \$500.00, or both. In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article, paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this section is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding \$10,000.00, or by both such fine and imprisonment.

(4) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

(5) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be made by showing that at the time such act was committed or conduct engaged in he

had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

(6) There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this section, and upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer, the same shall be delivered to and held by the clerk of the court having jurisdiction to try such violation. When the same is no longer required as evidence, the prosecuting officer, of any claimant may move the court in writing for the disposition of the same and after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this section, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.

(7) (a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney, county solicitor, or county prosecuting attorney in the name of the state upon the relation of such attorney, county solicitor, or county prosecuting attorney.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final

hearing or further order of the court. Whenever, the relator, state attorney, county solicitor, or county prosecuting attorney shall request a judge of said court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within three days after the making of such request. No such order shall be made unless such judge shall be satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one day, after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the state attorney or county solicitor or county prosecuting attorney before the issuance of a restraining order provided for by paragraph (b) of this

subsection, and there shall be no liability on the part of the state or the state attorney or the county solicitor or the county prosecuting attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

(8) The ~~several~~ sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorney shall vigorously enforce this section within their respective jurisdictions.

(9) This section shall not apply to the exhibition of motion picture films permitted by § 521.02.

(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(11) For the purposes of this section, the word person includes individuals, firms, associations, corporations, and all other groups and combinations.

823.05 Places declared a nuisance; may be abated and enjoined.

Whoever shall erect, establish, continue, or maintain, own or lease any building, booth, tent or place which

tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals of manners of the people as described in § 823.01, or shall be frequented by the class of persons mentioned in §856.02, or any house or place of prostitution, assignation, lewdness or place or building where games of chance are engaged in violation of law or any place where any law of the state is violated, shall be deemed guilty of maintaining a nuisance, and the building, erection, place, tent or booth and the furniture, fixtures and contents are declared a nuisance. All such places or persons shall be abated or enjoined as provided in §§ 64.11-64.15.

60.05 Abatement of nuisances.

(1) When any nuisance as defined in § 823.05, exists, the state attorney, county solicitor, county prosecutor, or any citizen of the county may sue in the name of the state on his relation to enjoin the nuisance, the person, or persons maintaining it and the owner or agent of the building or ground on which the nuisance exists.

(2) The court may allow a temporary injunction without bond on proper proof being made. If it appears by evidence or affidavit that a temporary injunction should issue, the court, pending the determination on final hearing may enjoin:

- (a) The maintaining of a nuisance;
- (b) The operating and maintaining of the place or premises where the nuisance is maintained;
- (c) The owner or agent of the building or ground upon which the nuisance exists;

(d) The conduct, operation or maintenance of any business or activity operated or maintained in the building or on the premises in connection with or incident to the maintenance of the nuisance.

The injunction shall specify the activities enjoined and shall not preclude the operation of any lawful business not conducive to the maintenance of the nuisance complained of. At least three days' notice in writing shall be given defendant of the time and place of application for the temporary injunction.

(3) Evidence of the general reputation of the alleged nuisance and place is admissible to prove the existence of the nuisance. No action filed by a citizen shall be dismissed unless the court is satisfied that it should be dismissed. Otherwise the action shall continue and the state attorney or county solicitor notified to proceed with it. If the action is brought by a citizen and the court finds that there was no reasonable ground for the action, the costs shall be taxes against the citizen.

(4) On trial if the existence of a nuisance is shown, the court shall issue a permanent injunction and order the costs to be paid by the persons establishing or maintaining the nuisance and shall adjudge that the costs are a lien on all personal property found in the place of the nuisance and on the failure of the property to bring enough to pay the costs, then on the real estate occupied by the nuisance. No lien shall attach to the real estate of any other than said persons unless five days' written notice has been given to the owner or his agent who fails to begin to abate the nuisance within said five days.

Title 28, U.S.C., Section 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Statement

Robert Mitchum, hereinafter called Mitchum, is the owner-operator of the sole proprietorship trading as THE BOOK MART in the City of Panama City, Florida. He was engaged in the sale and offering for sale of books, magazines, newspapers, and the showing of films and other matters presumptively protected under the *First Amendment* to the *Constitution of the United States*. This dissemination is conducted in a controlled adults only atmosphere.

Clinton E. Foster, hereinafter called Foster, is the Prosecuting Attorney in and for Bay County, Florida, M.J. "Doc" Daffin is the Sheriff of Bay County, Florida. W.L. Fitzpatrick, hereinafter called Judge Fitzpatrick, is a Circuit Judge in and for Bay County, Florida.

Foster, on March 30, 1970, filed a complaint in the Circuit Court of Bay County, a Court of original jurisdiction, before Judge Fitzpatrick seeking a temporary injunction against Mitchum (App. 27-33), to prevent the continuance of the operation of the book store alleging it to be a nuisance. A subpoena duces tecum issued, requiring Mitchum to appear before and present to Judge Fitzpatrick on April 3, 1970 a copy of every book, magazine, periodical and pamphlet offered for sale at the place of business, (App. 34-38). Mitchum complied. Foster merely selected 25 publications

and introduced them as evidence in this civil proceeding (App. 52-55). A police officer testified that the 25 publications in his opinion were obscene and that many people wanted THE BOOK MART extricated from the community (App. 57-60, 64-65). Three days later on April 6, 1970 Judge Fitzpatrick found only 6 of the selected publications obscene (App. 73). Based upon this finding he additionally found that the mere conducting of the business constituted a nuisance, (App. 74), and consequently issued an order enjoining the operation of the book store effectively causing the cessation of dissemination (App. 75). Mitchum immediately perfected an interlocutory appeal to the First District of Court of Appeals. (App. 76-77, 266-272). However, both Judge Fitzpatrick (App. 76), and the Appellate Court denied supersedeas, 244 So. 2d 154, (App. 78-80), which would have stayed this order pending appeal.

Mitchum, unable to obtain relief and under penalty of contempt if dissemination resumed, on April 30, 1970, filed a complaint in the United States District Court (App. 8-27), seeking injunctive relief from Judge Fitzpatrick's order. Winston E. Arnow, District Judge, hereinafter called Judge Arnow, issued a temporary restraining order on May 12, 1970, over one month after closure of the business, preventing Foster and Daffin from enforcing Judge Fitzpatrick's order except as to the sale of that material found to be proscribable following a judicially supervised adversary hearing held pursuant to due notice (App. 85-88, 113-116).

Mitchum then physically removed all copies of the publications ruled by Judge Fitzpatrick to be obscene and relying upon the District Court order again commenced dissemination. However, on May 29, 1970, Judge Fitzpatrick issued an order directing Mitchum to show cause why he and

his employees should not be held in contempt of court for resuming the operation of the business (App. 117-121), in violation of his order of April 6, 1970.

Mitchum then filed an amended complaint before Judge Arnow seeking to name Judge Fitzpatrick as a party (App. 106-107). Judge Arnow on June 5, 1970 issued the second temporary restraining order, preventing Judge Fitzpatrick from proceeding upon the contempt and preventing Judge Fitzpatrick from ordering the business closure, however, he did not prevent any contempt proceeding against Mitchum for distribution of any material that was determined to be proscribable following a judicially superintended adversary hearing held pursuant to due notice (App. 131-134).

Judge Fitzpatrick, on June 19, 1970 held another hearing, where Mitchum and 228 publications were subpoenaed (App. 145-146, 149-162). Foster introduced them into evidence. Without any evidence as to contemporary community standards, redeeming social value or prurient interest (App. 146), Judge Fitzpatrick on June 26, 1970, found 80 of these publications obscene, (App. 146-147, 190-192). Judge Fitzpatrick again found the mere operation of The Book Mart was prima facie injurious and damaging to the morals and manners of the people of the State of Florida and that it constituted a nuisance (App. 146, 192). Judge Fitzpatrick ratified, confirmed and continued his April 6, 1970 order enjoining the operation of the entire business (App. 147, 192, 193). Another interlocutory appeal to the First District Court of Appeals (App. 273-279), was perfected and that Court has failed to rule on it to this date. Mitchum informed Judge Fitzpatrick of this Court's decision of *Bloss v. Dykema*, 398 U.S. 278 (1970), and notwithstanding this, Judge Fitzpatrick found the publication "Pinned, No. 1" obscene, (App.

147-148,) contrary to this Court's finding. Mitchum, at the time of this order had none of the 228 publications in The Book Mart except those found not obscene in *Bloss*, supra.

Judge Fitzpatrick ordered the seizure of all publications offered for sale by Mitchum at The Book Mart requiring them to be impounded (App. 193), and restrained and enjoined Mitchum from selling or offering for sale any publication named in his order or any other publication of the same or similar character (App. 193).

The same date, June 25, 1970, Daffin seized every magazine, book, newspaper, film and other articles for sale located on The Book Mart premises including numerous copies of the publications found to be not obscene in *Bloss*, (App. 194-251). Mitchum filed a Motion for Leave to File a Supplemental Complaint (App. 253), for relief from Judge Fitzpatrick's order of June 25, 1970 which motion was granted by Judge Arnow on July 8, 1970 (App. 280-281).

Judge Arnow scheduled a hearing before the three-judge Court on July 16, 1970 for arguments upon the further relief sought by Mitchum and the dissolution of Judge Arnow's order by the state authorities.

The three-judge panel entered an order denying all injunctive relief and dissolved the restraints imposed by Judge Arnow (App. 308-314), on July 22, 1970. The same panel on September 15, 1970 also ordered Mitchum's complaint dismissed denying declaratory relief (App. 512-513). Mitchum filed an appeal to this Court from the denial of the injunctive relief under the three-judge statute on August 21, 1970 (App. 503).

During the proceedings in state Court before Judge Fitzpatrick, service of process had been contested and the state jurisdiction was disputed. However, since the three-judge panel decision state Court service of process has been perfected.

Summary of Argument

This Court for forty years has instructed the judiciary both state and federal that it is not possible to safeguard the precious *First Amendment* rights by permitting injunctive restraints upon the free exercise thereof utilizing overbroad statutes including nuisance statutes, *Near v. Minnesota*, 283 U.S. 697 (1931) as well as enjoining future dissemination. As so aptly put by Mr. Chief Justice Hughes, 283 U.S. 697 at 713, "This is the essence of censorship."

There are extensive parallels in *Near* and the case presently before the Court. Both were subject of a civil nuisance statute enforceable by injunction and contempt proceedings permitting prior suppression of future dissemination. Also both were subjected to preliminary injunctive sanctions.

With this clear mandate, followed from that time forward in multiple decisions, we find a state Court operating under a strikingly similar statute invoking the remedies found to be so abhorrent in *Near*.

The Florida Appellate Court also declined to follow *Near* and its progeny and refused to prevent the denial of these constitutional freedoms by the lower state court.

This is not a case involving a first impression principle that could have been resolved in state court. Clearly the opposite is true. Yet when faced with this clearly decided principle of law Mitchum was denied relief based upon Title 28, U.S.C. Section 2283 (The Federal Anti-Injunction Statute). With all the ample evidence before the three-judge court revealing irreparable injury, bad faith enforcement of the law and refusal of a state court to follow the dictates of this Court in *Near* as well as *Bloss*, that Court found the statute a bar to equitable relief under *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281.

The Florida statutes involved herein have been previously upheld in the Florida Courts; Section 847.011, F.S.A., *State v. Reese*, 222 So. 2d 732 and *Martin v. Contey*, NO. 40159, Sup. Ct. 5/26/71; Section 823.05, F.S.A., *Lanski v. State*, 199 So. 46 and *Merry Go Round, Inc. v. State*, 186 So. 538; Section 60.05, F.S.A., *Merry Go Round Inc. v. State*, 186 So. 538, and *Lanski v. State*, 199 So. 46 and the First District Court of Appeals has apparently sanctioned the state actions taken below, 244 So. 2d 154.

The Florida Courts reveal no propensity whatsoever to follow either the Federal Constitution or the dictates of this Court. Yet to follow the fruitless state Court procedures the final adjudication may take years in coming and then only from this Court.

To deny relief here is tantamount to no relief in the Courts of Florida no matter how excessive or unconstitutional the measures taken by enforcement authorities.

Argument

Appellant was brought before the Bay County, Florida Circuit Court where he was ordered to and did produce a copy of each item of *First Amendment* material offered for sale in his book store. The state prosecutor merely selected 25 publications and utilized the testimony of a police officer to ostensibly prove obscenity. The trial judge even with this limited evidence only found 6 of the publications proscribable. Had this been the total result appellate review may have been adequate.

At this juncture though, the Court then held the Appellants entire business operation to be a nuisance and enjoined further operation. The Appellate Courts refused to intervene and grant Mitchum relief. Mitchum faced with this situation repaired to Federal Court and over a month later obtained only such relief as to permit him to commence dissemination. Mitchum removed all copies of the 6 publications found proscribable by the state Court but this did not deter the State authorities for they again required Mitchum to appear in state Court to show cause why he should not be held in contempt for opening his book store. Mitchum then brought the State Court Judge into the federal proceeding as a party, however, this did not deter them, for they again brought Mitchum before the State Court with 228 publications. Judge Fitzpatrick found 80 of them proscribable and again ordered the book store closed as a nuisance. Mitchum also appealed this second injunction to the First District Court of Appeals on Supersedeas. That Appellate Court has yet to rule upon the appeal since filed in June of 1970.

Historically speaking the Florida Courts have not been shown as inclined to accord *First Amendment* freedoms their proper safeguards.

As an example we can review several of their Appellate decisions: In the case of *Reese v. State*, 222 So. 2d 732 it was held that the state could also appeal an adverse decision in a civil censorship proceeding and also held that subsequent decisions of this Court including *Memoirs v. Attorney General*, 383 U.S. 413, did not provide a clear modification of *Roth v. U.S.*, 354 U.S. 476 and possessed:

"... no dignity as ... judicial precedent."

and that the redeeming social value test was merely so much

"hocus-pocus phrases" at pp. 738.

The *Reese* Court also upheld the Florida statute acknowledging that it proscribed possession of obscene materials, pp. 733, contravening *Stanley v. Georgia*, 394 U.S. 557 yet found that possession with intent to sell was valid, pp. 735 - 736 since it could take place in a:

"school classroom, a hotel lobby, a public park — or the appellee's bedroom." (emphasis supplied).

In another matter styled *South Florida Arts Theaters v. State*, 224 So. 2d 706 (Fla. 4th D.C.A., 1969), cert denied 229 So. 2d 871 (Sup. Ct. Fla. 1969) *ex parte* injunctions without notice were upheld notwithstanding *Near*, *supra*, and *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175.

Time is another factor weighing against the vindication of *First Amendment* freedoms. In *Felton v. City of Pensacola*, 200 So. 2d 842 (D.C.A. 1st), the matter was adjudged in trial court February 28, 1966. The First District Court of Appeals (also the same Appellate Court as the one at bar) did not render its decision until July 6, 1967 more than 8 months after oral argument. Ultimately reaching this Court the judgment was reversed 390 U.S. 340 on March 11, 1968, over 2 years after the lower court judgment. Again in *Nissinoff v. Harper*, 212 So. 2d 666 the trial judgment was entered on March 14, 1967. The Court of Appeals did not set oral argument until more than 2 months after all briefs were submitted and did not render a decision until July 11, 1968 or more than a year and three months after trial judgment.

The trial judge herein declined to follow the principles of this Court set down in *Near* and the Appellate Court refused relief. Upon the second order the trial judge found a publication proscribable contrary to this Court's holding in *Bloss v. Dykema*, supra, which decision was given to the Court for consideration. Relief from this order also has not been forthcoming from the Appellate Court.

The totality of the circumstances herein as well as the actions taken by these enforcement authorities cannot be deemed anything but "bad faith enforcement" and from the judgments and orders with their result amply show great and immediate irreparable injury. For not only is this a prior restraint but a total suppression.

In this setting there can not conceivably be a bar to relief by virtue of the Anti-Injunction Statute. This is not a case where defense of a single prosecution brought in good faith would be justified.

This Court has not ruled that *Title 28, U.S.C. Section 2283* bars injunctive relief in all circumstances but has recognized that Equity will grant relief in appropriate circumstances, *Younger v. Harris*, 401 U.S. ____; *Perez v. Ledesma*, 401 U.S. ____; and *Byrne v. Karalexis*, 401 U.S. ____.

Appellant herein avers that the instant case involves both the exception (1) expressly authorized by Congress under *Title 42, U.S.C.A. 1983* as well as (3) to protect or effectuate its judgments, should a Declaratory Judgment issue.

The United States Supreme Court in *Dombrowski v. Pfister*, 380 U.S. 479, stated:

"We therefore find it unnecessary to resolve the question whether suits under 42 U.S.C. 1963 (1953 ed) come under the 'expressly authorized' exception to Section 2283."

And *Cameron v. Johnson*, 381 U.S. 741, was remanded for reconsideration in the light of criteria enunciated in *Dombrowski* directing the lower court's attention to N.2. When the case reached the Supreme Court again in *Cameron v. Johnson*, 390 U.S. 611 and N.3 on page 613 decided in April, 1968 it was noted the lower court found 42 U.S.C. 1983 created no exception to *Title 28, U.S.C.A. 2283*. Commenting upon this finding, this Court stated:

"We find it unnecessary to resolve either question and intimate no view whatever upon the correctness of the holding of the District Court."

Although there have been no authoritative ruling upon this point it may be noted that the Civil Rights statute

originated in 1871 and was promulgated to ensure federal enforcement to secure the citizens their rights, privileges and immunities secured by the constitution and laws of the United States and to implement the Supremacy clause of the Federal Constitution. The Anti-Injunction statute does not constitute an implied repeal or restriction of the Civil Rights Statute. In addition the Anti-Injunction statute conforms with it by providing that there should be certain exceptions if granted by Congress.

The exception (3) to protect or effectuate its judgments is also appropriate in the instant case. Whereas, should the United States District Court not dismiss the case at bar, as Appellant has shown it shouldn't, how then could the Court protect or effectuate its judgments that flow therefrom. It would be illogical for a federal court to be granted the jurisdiction and following an evidentiary hearing, be unable to fully adjudicate the issue by effectuating its judgment with an injunction.

The Supreme Court of the United States in *Dombrowski v. Pfister*, 380 U.S. 479 upheld injunctive relief granted in conjunction with its judgment:

"These shall include prompt framing of a decess restraining prosecution . . . and prohibiting further acts . . ."

The same Court in *Cameron v. Johnson (per curiam)*, 381 U.S. 741, instructed the lower court to make certain findings and thereafter to determine whether relief was proper in light of the criteria set forth in *Dombrowski* wherein injunctive relief was ordered.

In *Zwickler v. Koota*, *supra* the Supreme Court stated:

"It will be the task of the District Court on the remand to decide whether an injunction will be 'necessary and appropriate' should appellant's prayer for declaratory relief prevail."

See also *Star-Satellite, Inc. v. Rosetti*, 317 F. Supp. 1339, July 9, 1969, U.S.D.C. S.D. of Miss. where injunctive relief was granted to effectuate the court's judgment.

In *Machesky v. Bizzel*, 414 F.2d 283, the United States Court of Appeals for the Fifth Circuit stated:

"We hold also that where important public rights to full dissemination of expression of public issues are abridged by state court proceedings, the principles of comity embodied in Section 2283 must yield, and that the district court is empowered to enjoin the state court proceedings to the extent that they violate these First Amendment rights."

The court there found that an injunction was proper to protect or effectuate its judgment.

The United States District Court for the Eastern District of Pennsylvania in the case of *Grove Press, Inc. v. City of Philadelphia*, *supra* also had this matter to decide:

"As noted *supra* p. 284, Grove Press has requested this Court to grant it both injunctive and declaratory relief. Primarily, Grove seeks this relief for the purpose of vindicating its alleged constitutional right of freedom of expression as that right has been infringed by the pendency of the City's state equity action.

...

"This Court has concluded that the complaint filed by the City of Philadelphia in the state courts is on its face offensive to the constitutional rights of Grove Press. For reasons discussed below, Grove Press is therefore entitled to an injunction prohibiting the City of Philadelphia both from continuing its current civil prosecution in the state courts, and from instituting any further actions to prohibit the exhibition of the film "I Am Curious - Yellow" on the ground that such exhibition constitutes a 'nuisance'."

That court then went on to rule upon and reject the motion to dismiss filed by the city wherein they used 28 U.S.C.A. 2283 as their authority:

"The City filed a motion to dismiss Civil Action No. 69-972 on the ground that Title 28 U.S.C. 2283 prohibits a Federal Court from enjoining pending proceedings in a state court. It is arguable that 2283 does not apply here since Grove Press is not a party to the action in the state courts. More importantly, however, although the Supreme Court as yet has not decided the question, see, *Dombrowski*, supra, 380 U.S. at 484, f.n. 2, 85 S.Ct. 1116, the Court of Appeals for the Third Circuit has held that 2283's prohibition does not apply where the federal court action is predicated on Title 42, U.S.C. 1983 which by its terms specifically authorizes the granting of an injunction to stay state court proceedings. See *Cooper v. Hutchinson*, 184 F.2d 119 (C.A. 3, 1950). Accordingly the City's motion to dismiss Civil Action No. 69-972 is denied."

See also *Anderson v. City of Albany*, (C.A. Ga. 1963), 321 F.2d 649; *City of Greensboro v. Simpkins*, (C.A. N.C. 1957), 246 F.2d 425; *Lee v. Macon County Bd. of Ed.*, (D.C. Ala. 1963), 221 F. Supp. 297; *Butler v. Crumlish*, (D.C. Pa.

1964), 229 F. Supp. 565; — and also *Egan v. City of Aurora*, (C.A. Ill. 1960), 275 F.2d 377, affirmed in part, vacated in part on other grounds 365 US 514; *Basista v. Weir*, (D.C. Pa. 1964), 225 F. Supp. 619; *A.F. of L. v. Watson* (1946), 327 U.S. 582. And in particular see *Greenwood v. Peacock* (1966), 384 U.S. 808 at page 829-830.

The three-judge panel below found that injunctive relief was improper under *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers*, 398 U.S. 281. However, the *Atlantic Coast Line* case involved picketing where the Railway Labor Act (Title 45, U.S.C. 151) the Interstate Commerce Act and the Clayton Act (Title 29, U.S.C. 52) were involved where the Union sought federal relief some two years after the state injunctive order was in being and principally involved federal statutory claims.

Since this Court's rulings in *Atlantic Coast Line* and *Younger v. Harris*, supra, lower federal Courts have followed the dictates set out in these opinions; *Eve Productions, Inc. v. Shannon*, 439 F.2d 1073, *Veen, et al v. Davis*, No. 71-454-AAH, USDC., C.D. Cal (1971) each denying relief.

And other federal Courts have found the necessary criteria present to grant injunctive relief since these decisions. See *Board of Education v. Shelton*, U.S.D.C., N.D. Miss., decided 5/16/71; and *Taylor v. City of Selma*, U.S.D.C., S.D. Ala (3 judge) 4/8/71.

Each of these cases fully recognize that relief is obtainable upon a showing of great and immediate irreparable injury by way of harassment or bad faith enforcement of the laws.

In reviewing the history of the Anti-Injunction statute one can see that the legislation is not to be read in absolute terms preventing relief in all but cited circumstances. For instance exceptions exist as to the *Bankruptcy Act of 1867, Act of March 2, 1867, Ch. 176, Section 21, 14 Stat. 526; The Interpleader Act of 1926, 44 Stat. 416, as amended, 28 U.S.C. 1335; The Removal Acts, 28 U.S.C. 1441-1450; and Title 46, U.S.C. 185* limiting shipowner liability or where the federal government sought the injunctions, *Leiter Minerals Inc. v. U.S.*, 352 US 220.

Similarly an exception exists where a denial of equitable federal relief would be tantamount to forcing a citizen to undergo irreparable injury where the injury was both great and immediate at the hands of state authorities through harassment or bad faith enforcement of the laws, *Younger v. Harris; Perez v. Ledesma; and Byrne v. Karalexis*, supra, adhered to in *Board of Education v. Shelton; and Taylor v. City of Selma*, supra.

It is appropriate at this time for this Court to reverse the decision of the three-judge panel and delineate that where state courts and state enforcement authorities suppress constitutionally guaranteed freedoms contrary to the established holdings of this Nation's highest Court to the immediate irreparable injury of citizens of the United States through bad faith enforcement or harassment the federal judiciary must grant relief. For to do otherwise Mitchum and any other citizen faced with this type situation would be given effective relief only after years of state litigation. In addition, it would take an individual willing to give up great personal time and expense, to pursue his state remedies to the fullest, ultimately seeking relief in this Court only to find that vindication came too late in dissemination which by nature is

perishable by time. This is particularly true in *First Amendment* material where a July 1970 issue can finally lawfully be disseminated in July 1971.

Conclusion

It is an elementary principle of law that United States Supreme Court decisions are the law of the land. All lower federal and state Courts and enforcement authorities are bound by them.

In the face of this Court's decision of *Near v. Minnesota*, some forty years ago the prosecutorial authorities and the Courts of the State of Florida refuse to adhere to those principles and *in futura* prohibit sales of publications at a book store determining the operation of such store was *prima facie* injurious to the morals and manners of the people of the State of Florida.

When Mitchum sought vindication from this injury in federal Court he was denied relief because of *Title 28, U.S.C. 2283*. The Florida Courts have consistently upheld their statutes notwithstanding *Near* and it would be futile to seek relief from them.

The pattern of conduct complained of must certainly amount to bad faith enforcement and the result obtained clearly reveals great and immediate irreparable injury necessitating federal Court intervention.

It is therefore respectfully requested that this Court grant this appeal and find that *Title 28, U.S.C. 2283* is no bar to relief and to remand this matter to the three-judge panel for the granting of the proper relief to fully vindicate these *First Amendment* freedoms as mandated by *Near* under the criteria set forth in *Younger v. Harris* and *Perez v. Ledesma*.

Respectfully submitted,

Robert Eugene Smith

Paul Shimek, Jr.,

Of Counsel

Supreme Court, U.S.
FILED
AUG 16 1971

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 10-27 (876)

ROBERT MITCHUM, d/b/a THE BOOK MART,
Appellant,

-vs-

CLINTON E. FOSTER, as Prosecuting
Attorney of Bay County, Florida, M. J.
"DOC" DAFFIN, as Sheriff of Bay County,
Florida, and THE HONORABLE W. L.
FITZPATRICK, as Circuit Judge of the
Fourteenth Judicial Circuit in and for
Bay County, Florida,

Appellees.

On Appeal from the United States
District Court for the Northern
District of Florida
Pensacola Division

APPELLEES' BRIEF

ROBERT L. SHEVIN
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 10-27 (876)

ROBERT MITCHUM, d/b/a THE BOOK MART,
Appellant,

-vs-

CLINTON E. FOSTER, as Prosecuting
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"DOC" DAFFIN, as Sheriff of Bay County,
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FITZPATRICK, as Circuit Judge of the
Fourteenth Judicial Circuit in and for
Bay County, Florida,

Appellees.

On Appeal from the United States
District Court for the Northern
District of Florida
Pensacola Division

APPELLEES' BRIEF

OPINIONS BELOW

The memorandum opinion on July 22,
1970 (App. 308-314), of the United States
District Court for the Northern District

of Florida and the order dissolving the temporary restraining order is reported at 315 F. Supp. 1387 and the memorandum opinion on September 15, 1970 (App. 512-513); of that Court denying declaratory relief and granting dismissal is not as yet reported.

JURISDICTION

The judgment of the three-judge District Court of the Northern District of Florida dissolving the temporary restraining order, issued by His Honor, Judge Arnow, was entered on July 22, 1970 (App. 308-314). The judgment of the three-judge District Court denying declaratory relief and dismissing the action brought by Robert Mitchum was entered on September 15, 1970, (App. 512-513). A notice of appeal to this Court was filed in that Court on August 21, 1970, (App. 503).

The jurisdiction of this Court to review that decision is conferred by 28 U.S.C. 1253, there having been an order denying injunctive relief in a civil action required by Congress to be heard and determined by a District Court of three judges.

On May 3, 1971 this Court noted probable jurisdiction.

QUESTIONS PRESENTED


The question presented, as stated by the Appellant is wholly unacceptable to the Appellees as it is pregnant with assumptions of fact not considered by the District Court. Indeed, whether there was "bad faith" on the part of the Appellees, as opposed to an erroneous initial application of an otherwise valid law and/or whether there was irreparable injury both great and immediate would be the very matters to be determined by the District Court should this Court conclude said Court erred in denying injunctive relief. Accordingly, the Appellee will restate the questions presented on this appeal.

QUESTION ONE

WHETHER THE DISTRICT COURT
ERRED IN DENYING INJUNCTIVE
RELIEF BECAUSE THE ANTI-
INJUNCTION STATUTE PRECLUDED
A STAY OF THE PREVIOUSLY IN-
STITUTED AND PENDING STATE
COURT PROCEEDINGS.

QUESTION TWO

WHETHER THE PLAINTIFF BY SUBMITTING HIS FEDERAL CLAIMS TO THE STATE COURT, WITHOUT RESERVATION, DEPRIVED HIM OF THE RIGHT TO RESORT TO THE FEDERAL DISTRICT COURT FOR A RESOLUTION OF THOSE CLAIMS.



STATUTORY PROVISIONS INVOLVED

Statutes involved in this cause are set forth in full in Appellant's Brief and therefore will not be included herein.

STATEMENT OF THE CASE AND FACTS

The statement of the facts contained in Appellant's Brief does not accurately or completely present the circumstances as they developed in this cause. Accordingly, Appellees submit herewith their version, as reflected by the record.

On March 30, 1970, the State of Florida, by and through Clinton E. Foster, the Prosecuting Attorney in and for Bay County, Florida, filed a complaint against Robert Mitchum, Dave Ballue and Clarence Howard Cantey under Sections 823.05 and 60.05, Florida Statutes, seeking to have the business known as "THE BOOK MART", located at 19 Harrison Avenue, Panama City, Florida, declared a nuisance. (App. 27-33) By said complaint a prayer for a temporary injunction pending final judgment, and upon final hearing a final judgment abating said nuisance was requested.

Notice of hearing was given to the adverse parties on March 31, 1970 (App. 37) and a subpoena duces tecum was issued directing the defendants to bring to said hearing one copy of each magazine located on the premises. (App. 34) At the hearing, held on April 3, 1970, counsel for the defendants in the state cause (Appellant herein) made a complete and total assault upon the constitutionality of the above mentioned Sections of the Florida Statutes, as well as Section 847.011. The defendant Ballue was excused by the trial judge from bringing the magazines as directed by

the subpoena (App. 50) but he brought magazines which he said were representative of the materials sold at "The Book Mart" (App. 50). On April 6, 1970, the trial judge entered an order reciting he had jurisdiction of the parties and that certain named magazines, which were described in detail, were found to be obscene. (App. 73) The court upon such findings and upon the evidence presented at the hearing, entered a temporary injunction prohibiting the operation of The Book Mart. The trial judge specifically stated final adjudication would be expedited in any reasonable manner upon the Appellant's request. (App. 74)

On the following day, Appellant instituted an appeal to the District Court of Appeal, First District, from the interlocutory order. (App. 266) On April 23, 1970, Appellant filed an eighty-five (85) page Brief in said appellate court which also assaulted the constitutionality of the several statutes mentioned, relying upon alleged rights guaranteed under the United States Constitution. (App. 386-487)

Appellant then filed in the state appellate court a "Motion to Review An Order Denying Motion for Supersedeas" of the temporary restraining order pending the interlocutory appeal. (App. 76-77) This motion was orally argued and denied by the court for the reasons stated in its written opinion, Mitchum v. State, Fla.App. 1st 1970, 234 So.2d 420, reproduced in the Appendix beginning at page 78. The court noted that the materials

described in paragraph 4 of the trial judge's order were submitted as being representative of the magazines being sold by Appellant, 234 So.2d at 421, and concluded the order denying supersedeas was therefore not shown to be arbitrary, as required by Florida Appellate Rules.

Without seeking any further appellate review in either the Florida Supreme Court or this Court, the Appellant, on April 30, 1971, instituted the suit involved herein in the United States District Court, Northern District of Florida, by the filing of a complaint for declaratory and injunctive relief. (App. 5-27) Appellant alleged the foregoing facts and claimed the various statutes were unconstitutional as written and/or applied. Although there were allegations contained in the complaint asserting the acts of the state officials were unlawful and violative of his First Amendment rights, no facts were alleged nor was the claim made that the Appellees were acting in bad faith or were harassing Appellant. Appellant's damages were alleged to be "untold monetary damages", "loss of profits" and "interference with [his] advantageous business relations." (App. 15-16)

On May 11, 1970, the cause was heard before District Judge Winston E. Arnou on Appellant's application for a temporary restraining order. At said hearing counsel for the Appellees objected to the motion on the grounds that the court lacked jurisdiction since the Appellant submitted his federal claims to the state

court precluding him from relitigating them in the federal district court. It was also argued that the complaint failed to state grounds for federal injunctive relief and that the anti-injunction statute barred such relief since there was a pending state court proceeding. Judge Arnow concluded that since the Appellant sold materials other than those held obscene and since Section 60.05, Florida Statutes, provides that an "injunction shall not preclude the operation of any lawful business not conducive to the maintenance of the nuisance" preventing the operation of Appellant's presumptively lawful business presented "irreparable harm and injury." (App. 87) Judge Arnow concluded that under the principles enunciated in Dombrowski v. Pfister, 380 U.S. 479 (1965), Appellant was entitled to a temporary restraining order. Appellees Foster and Daffin were restrained from enforcing the state court injunction, except to the extent such order prevented the sale of any material determined to be obscene in a prior adversary judicial hearing held pursuant to due notice. (App. 87) Judge Fitzpatrick was not a party nor was he enjoined in any way whatsoever.

On May 29, 1970, Judge Fitzpatrick, on his own motion, entered an Order to Show Cause against the Appellant, Clarence Canteay, and Dave Ballue directing them to appear and show cause why they should not be held in contempt for violating his temporary injunction dated April 6, 1970. (App. 121) The hearing was set for June 5, 1970.

Shortly thereafter, Appellant filed in the state appellate court an "extraordinary motion" seeking an order from that court staying the interlocutory injunction so as to render it unnecessary for him to file an amended complaint in the federal district court seeking to add Judge Fitzpatrick as a party defendant and to obtain a restraining order against him. Appellant allegedly took this action in hopes of avoiding an unseemly confrontation between the United States District Court and the State Circuit Court. See: Mitchum v. State, Fla.App. 1st 1970, 237 So.2d 72. The state appellate court, on June 17, 1970, declined to grant the motion for the sound legal reasons stated in its admittedly harshly written opinion.

In the meantime, the Appellant, on June 4, 1970, filed a motion in the federal district court for leave to file an amended complaint making Circuit Judge Fitzpatrick a party defendant. (App. 106) The amended complaint alleged that Judge Fitzpatrick's actions were "clearly in conflict with" Judge Arnow's restraining order of May 12, 1970 (App. 110, par. 7) and was an attempt to punish Appellant for "operating and maintaining a lawful business as permitted by the order entered by the Honorable Winston E. Arnow." (App. 110) District Judge Arnow, after hearing argument on the motion, citing Sheridan v. Garrison, 5th Cir. 1969, 415 F.2d 699, and Dombrowski v. Pfister, supra, concluded there was presented irreparable damage requiring the granting of a temporary restraining order. (App. 132) No evidence was presented showing Appellant was served

with said order or was within the jurisdiction of the court, or that the threat of punishment as to him was great and immediate. District Judge Arnow thereupon restrained Judge Fitzpatrick from proceeding with a contempt hearing scheduled in the state court and also enjoined him from holding any other contempt hearing arising out of any alleged violation of his April 6, 1970 temporary injunction.

Since the Appellees were not enjoined from conducting further state proceedings to determine whether any given magazine was obscene and from enjoining the sale thereof, Appellee Foster filed an amended complaint in the state court alleging 214 specifically named periodicals were obscene and caused a second subpoena duces tecum to be issued directing the Appellant to produce them at a hearing scheduled for June 19, 1970. A hearing was held and the subpoena was complied with; however, several magazines not named were also produced, to-wit: "Cover Girl" and "Pinned." (App 292) At said hearing counsel for Appellant "...In order to save time..." tendered the magazines to Judge Fitzpatrick and agreed to "...stipulate that the entire evidence in the three boxes that we have here may go into evidence as representative of what is being sold at the store..." (App. 170) Judge Fitzpatrick asked counsel if he was admitting the publications and those of like nature were being offered for sale and counsel answered in the affirmative. (App. 171)

On June 25, 1970, Judge Fitzpatrick entered another order, reproduced on pages 190-193 of the Appendix. The order recites that he considered, among other publications, certain specifically named magazines and found all to be hard core pornography. (App. 192) He thereupon entered an order directing the sheriff to seize all publications offered for sale at The Book Mart and to retain them pending a final hearing. (App 193) He enjoined Appellant from selling or offering for sale any publication named in said order or any other publication of the same character. (App. 193) The seizure was effected by the Appellee Daffin.

On June 22, 1970, after this Court rendered its decision in Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970), Appellees filed a Motion to Vacate the temporary restraining orders on the grounds that said decision rendered continuance of said restraining orders inappropriate. (App. 138-139) The motion was noticed for hearing on June 26, 1970. (App. 137)

Prior to the hearing, and based upon the actions taken by Judge Fitzpatrick, the Appellant filed a motion for leave to file an amended complaint for a temporary restraining order, preliminary injunction and permanent injunction. Included therein was a prayer that Judge Fitzpatrick and the other defendants be held in contempt for violating Judge Arnow's June 5, 1970 restraining order. (App. 145-149) Judge Fitzpatrick, of

course, in no way violated that order since he did not attempt to hold Appellant in contempt.

The various motions were argued before Judge Arnow and the Appellees contended that in light of Atlantic Coast Line Railroad continuance thereof was unwarranted inasmuch as the theory espoused in Sheridan, supra, and upon which Judge Arnow relied, was authoritatively repudiated. It was argued that while Judge Arnow's previous actions were supportable under Sheridan the Appellees' previously urged position that §2283 was an absolute bar to injunctive relief could not now seriously be questioned and that Sheridan could certainly not support continuance of the restraining orders. Judge Arnow declined to rule on any of the motions, except the motion for leave to file Appellant's amended complaint, pending hearing thereon by the full three-judge court (App. 281-82) scheduled for July 16, 1970.

Thereafter, the matter came on for hearing before the three-judge court, where it was again argued that injunctive relief was barred by §2283 and that the Appellant was precluded from raising his federal claims since he had raised them, without reservation, in the state courts and suffered an adverse ruling. Counsel for the Appellees advanced the identical argument presented to the same three judges on May 22, 1970, in the case of State of Florida, ex rel. Earl Faircloth v. M & W Theatres, Inc., appeal pending, Case No. 70-10, October Term 1971, buttressed by the teachings of Atlantic Coast Line Railroad, supra.

On July 22, 1970, the three-judge court entered the order appealed denying Appellant's prayer for injunctive relief and dissolving the outstanding restraining orders entered by Judge Arnow. (App. 308-14) Their order rested upon this Court's decision rendered in Atlantic Coast Line Railroad and their conclusion that the Appellant's cause did not come within any of the three exceptions set forth in §2283. (App. 311)

QUESTION ONE

WHETHER THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE RELIEF BECAUSE THE ANTI-INJUNCTION STATUTE PRECLUDED A STAY OF THE PREVIOUSLY INSTITUTED AND PENDING STATE COURT PROCEEDINGS.

ARGUMENT

Section 2283 of Title 28 U.S.C. provides:

"A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effect its judgment." (Emphasis supplied)

This Court in Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970), clearly and unequivocally held §2283 was "...not a statute conveying a broad general policy for appropriate ad hoc application...[and that]...Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions..." This Court then held:

"Since that time Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to §2283 if it is to be upheld.

Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." 398 U.S. at 287

In Atlantic Coast Line, just as in the instant case, a State court injunction had been previously entered and the District Court was asked to enjoin the parties from giving effect to or availing itself of the benefits of that state court order. In Atlantic Coast Line, the federal plaintiffs asserted their federally protected right to picket (their right to peaceably assemble and free speech) and this Court assumed the state trial judge was wrong in his interpretation of this Court's prior decision. See footnote 5

at page 291. Notwithstanding, this Court vacated the injunction issued by the District Court because it was not based upon one of the specific statutory exceptions to §2283. Moreover, this Court rejected the argument that the "principles of comity" rendered §2283 "...inapplicable in extraordinary cases in which an injunction against state court proceedings is the only means of avoiding grave and irreparable injury..." See Brief of Respondents 26 L.Ed 2d at 866. This Court after properly noting our dual system could not function if state and federal courts were free to fight each other for control of a particular case, 398 U.S. at 286 perceptively noted:

"...Nor was an injunction necessary because the state court may have taken action which the federal court was certain was improper under the Jacksonville Terminal decision. Again, lower federal courts possess no power whatever to sit in direct review of state court decisions. If the union was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the Florida appellate courts and ultimately, if necessary, in this Court. Similarly if, because of the Florida Circuit Court's action, the union faced the threat of immediate irreparable injury sufficient to justify an injunction under usual equitable principles,

it was undoubtedly free to seek such relief from the Florida appellate courts, and might possibly in certain emergency circumstances seek such relief from this Court as well..." 398 U.S. at 296 (Emphasis supplied)

In the instant case, the Plaintiff, just as did the plaintiff in Atlantic Coast Line, asserted their allegedly federally protected rights and claimed the State trial judge erroneously interpreted prior decisions emanating from this Court, including Near v. Minnesota, 283 U.S. 697 (1931). The facts and circumstances of this case are no different from those presented in Atlantic Coast Line Railroad. In both, relief from allegedly unlawful state court judicial decrees were sought by resort to a United States District Court and in both federally protected rights were asserted.

Counsel's attempt to minimize the rights asserted or involved in Atlantic Coast Line (Brief at page 24) ignores reality. It was more than just a railroad case! The right to picket is clearly of equal dignity of those asserted by this appellant. Cameron v. Johnson, 390 U.S. 611 (1968). Indeed, a valid argument could be made that appellant's rights involved commercial or economic rights and thus were of less importance. Carter v. Gautier, (M.D. Ga. 1969) 305 F.Supp 1098; Mitchum v. State, Fla.App. 1st 1970, 237 So.2d 72. The fact that "...the subject of sex is of constant but rarely particu-

larly topical interest..." apparently justifies the conclusion that the rights involved in Atlantic Coast Line were far more important inasmuch as they involved political and social expression. Carroll v. President and Commissioners of Princess Ann, 393 U.S. 175, 182 (1968)

Whether appellant's rights were of less importance or of equal dignity is actually immaterial for unless this Court concludes the Civil Rights Act, 42 U.S.C. §1983, provides an express exception to the anti-injunction statute it must affirm the order appealed, on the authority of, and for the precise reasons stated in Atlantic Coast Line Railroad. As the District Court observed, "...no amount of tortured reasoning by us will suffice to force the factual situation in this case... into fitting any of the statutory exceptions to the anti-injunction mandates of Title 28, U.S.C., Section 2283..." (App. 312)

* * * * *

Counsel attempts to extract from Younger v. Harris, 401 U.S. ____, 27 L.Ed 2d 669 (1971), and the companion cases decided by this Court on February 23, 1971, a judicial exception where bad faith harassment is shown. (Brief at page 25) No such construction is permissible for several reasons. First, this Court itself declined to consider whether 28 U.S.C. §2283 prohibited injunctive relief in and of itself because it was unnecessary for a disposition of the case. 27 L.Ed 2d at 681. Secondly, the "judicial exception"

referred to in Younger, supra, was stated to be "...where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages...." 27 L.Ed 2d at 675 (Emphasis supplied) This Court cited to Ex Parte Young, 209 U.S. 123 (1908) which of course held the courts of the United States have the power to enjoin state officers from instituting criminal actions. See also: Fenner v. Boykin, 271 U.S. 240, 243-44 (1926). The anti-injunction statute has been interpreted to mean that it does not preclude injunctions against the institution of state court proceedings, but only bars stays of suits already instituted. Dombrowski v. Pfister, 380 U.S. 479 (1965) footnote 2 at page 484. The Appellee does not question the authority of a Federal district court to enjoin a State officer from instituting a criminal prosecution. Of that there can be no question assuming exceptional circumstances exist.

It seems rather clear that this Court reversed Younger and the companion cases applying general equitable principles applicable where formal proceedings have not been instituted. Since they could not be justified even under general principles, it was unnecessary to decide the issue raised herein. The argument advanced that a person's right to have his federal claims determined in a federal court should not hinge upon a "race to the courthouse" simply ignores the fact that where injunctive relief is sought, by virtue of our dual system, the federal

courthouse door is generally closed tight. The reasons rest deeply imbedded in our history and our Constitution. Younger v. Harris, supra, 27 L.Ed 2d at 675-76 and Atlantic Coast Line Railroad, supra, 398 U.S. at 285-86. See also: Douglas v. City of Jeannette, 319 U.S. 157 (1943).

The Appellee suggests that no inference can be drawn from Younger that injunctive relief against pending state proceedings is authorized where bad faith harassment or irreparable injury is shown by virtue of this Court's express statement that that issue was not being considered or disposed of. Yet, that is exactly what Appellant is attempting to do!

* * * * *

Before discussing the ultimate issue before this Court, the Appellee feels compelled to mention the case of Machesky v. Bizzel, 5th Cir. 1969, 414 F.2d 283, a case relied upon by Appellant. The Court in that case did not decide whether §1983 constitutes an express exception to the anti-injunction statute but rested the decision upon the conclusion that §2283 was not an absolute prohibition but was "...no more than a statutory enactment of the principle of comity..." 414 F. 2d at 287. See also: Sheridan v. Garrison, 5th Cir. 1969, 415 F.2d 699: As has been previously noted, this Court in Atlantic Coast Line Railroad, supra, completely rejected that contention and counsel's reliance upon Machesky is wholly unwar-

ranted. It was this very fact that caused Judge Arnow, who had previously relied upon Sheridan (App. 132) to concur with the other district judge in denying injunctive relief. (App. 314)

* * * * *

The District Court, although it did not expressly so state, obviously concluded that 42 U.S.C. §1983 did not expressly authorize the issuance of injunctions against pending state court proceedings and thus within the exceptions specified in the anti-injunction statute. The Appellees submit that that is the proper conclusion; that this Court should so hold; and, that the District Court should be affirmed.

42 U.S.C., §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitutions and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In Hemsley v. Myers, Circuit Court, D. Kan. 1891, 45 Fed. 283, a somewhat similar situation arose. An injunction was obtained against Hemsley declaring his place of business a nuisance restraining him from the further sales of intoxicating liquors. Hemsley filed an action in the federal court seeking injunctive relief against the sheriff, county attorney and state trial judge alleging he was being harassed and deprived of his right to carry on the business in which he was engaged and that the Kansas statute was in contravention of the Constitution of the United States. After hearing a temporary injunction was issued against further efforts to abate the use of the premises. A demurrer to the bill was filed. Said demurrer was sustained, the temporary injunction dissolved and the bill dismissed for want of equity.

In speaking of Section 720, the predecessor to 28 U.S.C. §2283, Judge Caldwell said:

This section, save the exception, is as old as the judicial system of the United States. Its prohibition is absolute and unqualified, except where the injunction is authorized by law in proceedings in bankruptcy. This exception serves to emphasize the prohibition as to all other cases. In cases where the jurisdiction of the court of the United States first attaches, the statute has no application; but in the cases

we are considering the jurisdiction of the state courts first attached, and that fact, independently of the statute, according to a well-settled rule, is a bar to the jurisdiction of this court. To the observance of the rule enunciated by this section and other cognate rules we are indebted for the almost uniform harmonious relations that have existed between the state and the United States courts, from the foundation of the government down to the present time. The rule would probably have been the same independently of the statute. The state courts observe the rule towards the courts of the United States upon principle, and without any statute requiring them to do so. It is not merely a rule of comity, but an absolute rule of law, obligatory on the courts of both jurisdictions, and absolutely essential to the maintenance of harmonious relations between the state and the United States courts, and indispensable to the due and orderly administration of justice in both. Appeals may be taken in certain cases from the state courts to the supreme court of the United States, and in this way suitors claiming a right or privilege under the constitution of the United States, or an act of con-

gress, or a treaty, may have the validity of their claim finally determined by the supreme court of the United States; but the district and circuit courts of the United States possess no appellate or supervisory jurisdiction over the state courts.

° The circuit courts of the United States and the state courts are each destitute of all power either to restrain or review the process or proceedings in the other. This rule has had the approval of the courts, lawyers, legislators, and laymen from the beginning of our system of government. The rule commends itself to the common sense of all mankind; and there can be no higher evidence of the soundness of a rule of law than that there is a universal consensus of opinion that it is sensible and just.

It was specifically argued that the Civil Rights Act of 1871 repealed or abrogated, either wholly or partially, the anti-injunction statute. 45 Fed. at 289. In rejecting that argument Judge Caldwell stated:

"The provision in the section, as originally enacted, conferring jurisdiction on the district and the circuit courts of the causes of action enumerated in the section, has been transferred to the head of jurisdiction.

of those courts respectively. The section does not repeal, limit, or restrict the previously existing rules affecting the relations of the state and the United States courts, nor does it abolish the distinction between law and equity, or change the rules of pleading or mode of proceeding in any respect. If the section was stricken out of the statute, the rights, privileges, and immunities of the citizens under the constitution and laws would remain to them, and the mode of seeking redress for a deprivation of these rights would be the same that it is now. The section declares that the mode of proceeding to obtain redress for a deprivation of these rights shall be by 'an action at law, or a suit in equity, or other proper proceeding for redress.' If the case is one which under the well-understood rules of pleadings is cognizable only at law, then an action at law is the 'proper proceeding for redress;' and if it is one cognizable only in equity, then a suit in equity is the 'proper proceeding for redress.' No new mode of proceeding is enacted, and no new right created by this section. As it now stands in the Revised Statutes, it may be properly

denominated a 'declaratory' statute. And the statutes and rules of law defining and regulating the powers, relations, and jurisdiction of the state and the United States courts with reference to each other are not affected by this section in the slightest degree."

Interestingly, Judge Caldwell well appreciated the confusion and failure of justice that would result from a contrary holding and observed that an extraordinary spectacle would be presented of a United States court of chancery while it determined whether to grant the state leave to prosecute the alleged violation. 45 Fed. at 288.

In Baines v. City of Danville, 4th Cir. 1964, 337 F.2d 579, it was again argued that the Civil Rights Act was an exception to the anti-injunction statute. In an exhaustive opinion on the subject the Court rejected such contention saying:

"In strong contrast is the Civil Rights Act. It creates a federal cause of action, but with no suggestion, explicit or implicit, that appropriate relief shall include an injunction which another Act of Congress forbids. The substantive right, in many situations, may call for equitable relief, and equitable remedies are authorized, but only by a general jurisdictional grant. Creation of a general equity jurisdiction.

is in no sense antipathetic to statutory or judicially recognized limitations upon its exercise. Effective removal of a cause of action from a state court to a federal court is incompatible with further proceedings in the state court, but there is no incompatibility between a generally created equity jurisdiction and particularized limitations which restrict a chancellor's power or define the limits of his discretion.

"The anti-injunction statute can have effective application only with respect to those matters over which the district courts have a general equity jurisdiction. If there is no jurisdiction to grant an injunction of any kind, there is no room for the operation of a narrow statutory prohibition of injunctions having a specified effect. If every grant of general equity jurisdiction created an exception to the anti-injunction statute, the statute would be meaningless.

"As we have seen, the few statutory exceptions to the anti-injunction statute, which the Supreme Court in 1941 recognized as having been carved out of the anti-injunction statute, rested upon statutes which were, at the least, thoroughly incompatible

with a literal application of the anti-injunction statute."

The Court, in response to the dicta contained in Cooper v. Hutchinson, 3rd Cir. 1950, 184 F.2d 119, to the contrary conclusion observed:

"Despite these considerations, or rather without overt recognition of them, it was held in Cooper v. Hutchinson, 3 Cir., 184 F.2d 119, that a Civil Rights Act provision for a suit in equity constituted an express authorization for an injunction against state court proceedings within the meaning of the qualification of §2283. The court did not indicate in any way why it thought a general provision for equity jurisdiction would constitute such an exception to the anti-injunction act. It simply stated its conclusion without elucidating the problem or its reasoning. Oddly enough, the court went on to deny injunctive relief on the general principles of equity and comity exemplified by Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed 1324, the same principles which underlie §2283.

"Later, a district court in the Third Circuit dutifully followed the lead of its Court of Appeals in Tribune Review Publishing

Company v. Thomas, W.D.Pa., 153 F.Supp. 486. Oddly, again, after holding, because of the Civil Rights Act, it had power to enjoin the state court proceeding, it found there was no basis for any relief and none was awarded.

"On the other hand, it was held in Smith v. Village of Lansing, 7 Cir., 241 F.2d 856, in Goss v. Illinois, 7 Cir., 312 F.2d 257, and in Sexton v. Barry, 6 Cir., 233 F.2d 220, that the Civil Rights Act's authorization of equitable relief was not an exception to the anti-injunction provisions of §2283. The conclusion was reached in those cases without reference to the Third Circuit case of Cooper v. Hutchinson and without consideration of the problem in depth.

"These conflicting decisions from our fellow courts in the lower echelon of the federal judicial system are of little help. Whether one follows the lead of the one or the other depends not upon the grace with which each expressed its ipse dixit, but upon underlying considerations which none of them explored. On one side or the other, there may have been a flash of genius, but their unelucidated conflict leaves us with no basis for reliance upon any of them.

"Our analysis, which we have outlined above, leads away from the Third Circuit's conclusion in Cooper v. Hutchinson. Statutory exceptions are not so easily found from a Congressional enactment of such vintage. Unless the later statute contains, or carries with it, strong evidence of an intention to repeal the earlier, or to carve out an exception from it, a court's duty is to harmonize the two. We possess no legislative power of repeal. When we deal with valid statutes, our only role is to construe them."

Other cases holding the Civil Rights Act not to be an express exception to §2283 are Smith v. Village of Lansing, 7 Cir. 1957, 241 F.2d 856; Vojcik v. Palmer, 7 Cir. 1963, 318 F.2d 171; Sexton v. Barry, 6 Cir. 1956, 233 F.2d 220; Brooks v. Briley, M.D. Tenn. 1967, 274 F.Supp. 538 aff'd 391 U.S. 361; Cameron v. Johnson, S.D. Miss. 1966, 262 F.Supp 873 aff'd 390 U.S. 611 (1968); and Rage Books, Inc. v. Leary, S.D.N.Y. 1969, 301 F.Supp. 546.

Grove Press, Inc. v. City of Philadelphia, E.D.Pa. 1969, 300 F.Supp. 281, a case relied upon by Appellant, without any discussion of the matter, simply cited to Cooper v. Hutchinson, supra. Moreover, Grove Press was not a party to the action in the state courts and hence §2283 was wholly inapplicable. Another case holding §1983 expressly authorizes injunctive re-

lief against pending state proceedings is Landry v. Daley, N.D. Ill. 1968, 288 F.Supp. 200. In that case, without citations of authority, the Court concluded "...an express exception has often times been found by implication..." 288 F.Supp. at 222. This reasoning is untenable for it is irreconcilable with this Court's admonition in Atlantic Coast Line Railroad, supra, that:

"[A]ny injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to §2283 if it is to be upheld. Moreover, since the statutory prohibition against such injunctions in part rests upon the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction." 398 U.S. at 287 (Emphasis added)

Landry, like Sheridan predicated its holding on the premise that §2283 was to be interpreted with reference to the judicial doctrine of comity and not as an absolute bar, which, of course, is an improper construction of §2283.

None of the cases cited by Appellant on pages 23 and 24 of his Brief are applicable for not one involved an injunction against a state court proceeding. Indeed, Egan v. City of Aurora, 7 Cir.

1960, 275 F.2d 377; wasn't even an equitable action but was a civil action seeking damages under the Civil Rights Act.

The conclusion reached by the Fourth Circuit Court of Appeals in Baines v. City of Danville, supra, that the general grant of equity jurisdiction by the Civil Rights Act did not expressly authorize injunctive relief against pending state proceedings, is consistent with Atlantic Coast Line's rationale, and ought to be adopted by this Court. It is not only logical but it preserves the historic relationship between the State and Federal courts and is conducive to the orderly dispensation of justice. It avoids not only the friction which occurs when a federal court interferes with a state court, as exemplified by Mitchum v. State, supra, but it prevents the confusion and failure of justice that would obviously attend a contrary holding, as noted in Hemsley v. Myers, supra.

This Court in Greenwood v. Peacock, 384 U.S. 808 (1966), strictly construed the removal statutes, rejecting an appeal by the appellants not unlike that advanced herein, to-wit: that justice could not be had in the state courts. In so doing, this Court made the obvious and cogent observation:

"It is worth contemplating what the result would be if the strained interpretation of §1443(1) urged by the individual petitioners were to prevail. In the fiscal

year 1963 there were 14 criminal removal cases of all kinds in the entire Nation; in fiscal 1964 there were 43. The present case was decided by the Court of Appeals for the Fifth Circuit on June 22, 1965, just before the end of the fiscal year. In that year, fiscal 1965, there were 1,079 criminal removal cases in the Fifth Circuit alone. But this phenomenal increase is no more than a drop in the bucket of what could reasonably be expected in the future. For if the individual petitioners should prevail in their interpretation of §1443(1), then every criminal case in every court of every State--on any charge from a five-dollar misdemeanor to first-degree murder--would be removable to a federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race and that he was completely innocent of the charge brought against him, or (2) that he would be unable to obtain a fair trial in the state court. On motion to remand, the federal court would be required in every case to hold a hearing, which would amount to at least a preliminary trial of the motivations of the state officers who arrested and charged the defendant, of the quality of the state court or judge before whom the charges

were filed, and of the defendant's innocence or guilt. And the federal court might, of course, be located hundreds of miles away from the place where the charge was brought. This hearing could be followed either by a full trial in the federal court, or by a remand order. Every remand order would be appealable as of right to a United States Court of Appeals and, if affirmed there, would then be reviewable by petition for a writ of certiorari in this Court. If the remand order were eventually affirmed, there might, if the witnesses were still available, finally be a trial in the state court, months or years after the original charge was brought. If the remand order were eventually reversed, there might finally be a trial in the federal court, also months or years after the original charge was brought.

"We have no doubt that Congress, if it chose, could provide for exactly such a system. We may assume that Congress has constitutional power to provide that all federal issues be tried in the federal courts, that all be tried in the courts of the States, or that jurisdiction of such issues be shared. And in the exercise of that power, we may assume that Congress is constitutionally fully

free to establish the conditions under which civil or criminal proceedings involving federal issues may be removed from one court to another.

"But before establishing the regime the individual petitioners propose, Congress would no doubt fully consider many questions. The Court of Appeals for the Fourth Circuit has mentioned some of the practical questions that would be involved: 'If the removal jurisdiction is to be expanded and federal courts are to try offenses against state laws, cases not originally cognizable in the federal courts, what law is to govern, who is to prosecute, under what law is a convicted defendant to be sentenced and to whose institution is he to be committed. . . ?' Baines v. City of Danville, 357 F.2d 756, 768-769. To these questions there surely should be added the very practical inquiry as to how many hundreds of new federal judges and other federal court personnel would have to be added in order to cope with the vastly increased caseload that would be produced.

"We need not attempt to catalog the issues of policy that Congress might feel called upon to consider before making such an

extreme change in the removal statute. But prominent among those issues, obviously, would be at least two fundamental questions: Has the historic practice of holding state criminal trials in state courts--with power of ultimate review of any federal questions in this Court-- been such a failure that the relationship of the state and federal courts should now be revolutionized? Will increased responsibility of the state courts in the area of federal civil rights be promoted and encouraged by denying those courts any power at all to exercise that responsibility?

"We postulate these grave questions of practice and policy only to point out that if changes are to be made in the long-settled interpretation of the provisions of this century-old removal statute, it is for Congress and not for this Court to make them."

See also: Stefanelli v. Minard, 342 U.S. 117 (1951) at 123-25, where this Court noted that insupportable disruption would result. Quoting Mr. Justice Holmes, this Court said:

"The relation of the United States and the Courts of the United States to the States

and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and cannot be disposed of by a summary statement that justice requires me to cut red tape and to intervene." Memorandum of Mr. Justice Holmes in 5 The Sacco-Vanzetti Case, Transcript of the Record (Henry Holt & Co., 1929) 5516...." (Emphasis supplied) 342 U.S. at 125

The same vices referred to would result from a "loose construction" of the statutes involved herein. It would in effect make every United States District Court a tribunal obliged to conduct preliminary hearings of those charged with crimes under state laws. This Appellant, and those who auger for his position, are seeking to obtain through the Civil Rights Act that which they cannot have under the removal statutes. It seems strange to suggest that removal can justifiably be denied because of the Appellant's ability to vindicate his federal claims on direct review by this Court, 384 U.S. at 828, but that he can obtain federal relief in a district court under the Civil Rights Act. Such illogic would render the removal statute wholly unnecessary and the Civil Rights Act would then permit that which the civil rights removal statute does not, to-wit: "...the judges of the federal courts to put their brethren of the state judiciary on trial..." 384 U.S. 808, 828. That is precisely what occurred in this case with Judge Fitzpatrick.

A construction of said statutes as urged herein, on the other hand, would avert the evils mentioned. Additionally, it would provide a more workable guide for lower federal courts. Preliminary hearings, into the good faith of state authorities hundreds of miles from the locus of the controversy, which are themselves disruptive of the orderly administration of justice, would be unnecessary. The district court would merely have to look at the pleadings to determine whether to proceed further or deny relief summarily. The immediate effect would be the elimination of wasted judicial labor spent on determining whether the district court abused its discretion, applying general equitable principles. Cf. Gideon v. Wainwright, 372 U.S. 335 (1963). This would not mean the loss of a federal forum to consider the federal claims for there is a federal court properly constituted to sit as an overseer of the states, to-wit: this Court! Cameron v. Johnson, Atlantic Coast Line Railroad, and Greenwood v. Peacock, supra.

The Appellee respectfully submits that logic, common sense, order, statutory construction, history, and the Constitution itself commands this Court to conclude that the Civil Rights Act does not expressly authorize a court of the United States to enjoin or stay a pending state court proceeding.

* * * * *

The Appellee feels compelled to respond to Appellant's charge that "...[h]

historically speaking the Florida Courts have not been shown as inclined to accord First Amendment freedoms their proper safeguards..." (Appellant's Brief, p. 18)

Contrary to Appellant's interpretation of State v. Reese, Fla. 1969, 222 So.2d 732, which was not a civil censorship proceeding, but was on appeal by the State from an order declaring the statute unconstitutional, not unlike the case of United States v. Thirty-Seven (37) Photographs, ____ U.S. ____, 28 L.Ed 2d 822 (1971), the Florida Supreme Court specifically held §847.011 "...should be interpreted, and the words of our obscenity statute applied, in the light of the clarification or elaboration of the Roth test made in Memoirs, supra..." 222 So. 2d at 735. The Florida Supreme Court's narrow construction of Stanley v. Georgia, 394 U.S. 557 (1969), the correctness of which is not now before this Court, seems supportable in light of United States v. Reidel, ____ U.S. ____, 28 L.Ed 2d 813 (1971).

As to the soundness of South Florida Arts Theatres v. State ex rel. Mounts, Fla. App. 4th 1969, 224 So.2d 706, which likewise is not before this Court, the Appellee merely observes that said opinion speaks for itself. It may be determined in a future case that the decision is incorrect but the undersigned could, with some conviction, argue the merits before this very Court. The court in that case gave considerable attention to the prior decisions of this Court per-

taining to the issue. 224 So.2d at pages 709-12.

Appellant's claim that he was denied prompt judicial determination is not well founded. The state trial judge offered to expedite final hearing to accommodate counsel (App. 74) but Appellant elected to engage in a constitutional assault upon the statutes in both the state appellate courts and the federal courts. The delays caused by Appellant's flanking action cannot be considered the State's fault. United States v. Thirty-seven Photographs, supra, 28 L.Ed 2d at 833.

Rather than belabor the matter to a point of absurdity, the Appellee concludes by observing that when this Appellant finally presented the issues raised in the district court to the proper court under the Constitution of the State of Florida, Article V, Section 4(2), that Court granted him his relief as required by the Constitution of the United States as interpreted by this Court. Mitchum v. State ex rel. Schaub, Fla. 1971, ____ So.2d ____, Case No. 40,334, Opinion filed July 9, 1971, not yet reported. A copy of the Opinion in this case is reproduced and appears in the Appendix to this Brief. In said decision the Court reversed the finding of obscenity because the trial judge failed to apply the Memoirs test and dissolved the injunction entered on the nuisance theory citing Near v. Minnesota, supra.

The Appellant's charge that the Florida

Supreme Court is insensitive to the constitutional rights of the litigants appearing before it is unwarranted and unfounded in fact. It has been challenged herein for it is, in fact, a charge that said tribunal is impervious to its constitutional duty to protect the constitutional rights, both state and federal, of those appearing before it. Such an accusation should only be made where it can be clearly and unequivocally demonstrated. In this, appellant has fallen woefully short. Undoubtedly, Appellant's verbal overkill is due to his "...impatient commitment to their cause..." Walker v. City of Birmingham, 388 U.S. 307 (1967), which was what also caused him to improperly feel he could violate the state court temporary restraining order. Walker v. City of Birmingham, supra.

* * * * *

Appellee likewise feels compelled to respond to Appellant's newly founded claim of "bad faith harassment" as well as his contention that the totality of the circumstances demonstrate "great and immediate irreparable injury." (Appellant's Brief, p. 19)

First, the district court made no finding with respect to the motive of the Appellees, jointly and severally. Their decision was predicated on the conclusion that the anti-injunction statute was an absolute bar to injunctive relief and the court never reached the

issue of whether there was any bad faith, or irreparable injury, which could not be vindicated by normal proceedings.

Secondly, the complaint, and those following, never alleged bad faith and Judge Arnov never even intimated his restraining orders were based on such a finding. In fact, Judge Arnov was of the view that under Dombrowski and its progeny bad faith was not a requisite for in the case of State of Florida, ex rel Earl Faircloth v. M & W Theatres, Inc., appeal pending before this Court, Case No. 70-10, Oct. Term 1971, he granted injunctive relief in a case not unlike this one where it was stipulated that there was no bad faith. See Jurisdictional Statement in Case No. 70-10, at p. 6. Judge Arnov's actions in M & W Theatres, Inc. occurred on April 30, 1970, the same date the Appellant herein filed his complaint. Inasmuch as bad faith has now been raised for the first time---no doubt because of the Younger holding---the Appellees deny they or any one of them acted in "bad faith."

As to the Appellant's claim of irreparable injury, to-wit: that he was suffering a loss of profits and his business relations were being interfered with, which is what Judge Arnov based his restraining order on, as in M & W Theatres, Inc. also, that simply is not "irreparable injury." Reetz v. Bozanich, 397 U.S. 82 (1970); Tyrone, Inc. v. Wilkinson, E.D. Va. 1969, 294 F.Supp. 1330 at 1333.

As to the anticipated contempt hearing, which was brought about by Appellant's violation of the outstanding state court injunction which had never been vacated by any court, that could not constitute irreparable injury for he could vindicate his rights in his defense of that charge. Even if Judge Fitzpatrick's order was unlawful, Appellant was obliged to give obedience to it, the proper remedy for relief being by judicial review in the appropriate appellate court. Walker v. City of Birmingham, supra. The federal district court was simply not the proper forum to contest the validity of the state court injunction. Atlantic Coast Line Railroad, supra. The effect of the restraining order entered by Judge Arnou was to render the state court judge impotent to effecuate and protect the lawful order he had previously entered. Such action was unwarranted and unprecedented.

As has been previously stated, these issues were not considered or passed upon by the three-judge district court and therefore are not relevant to the issue presented. They are discussed by the Appellee only because Appellant insists on injecting them into this cause and they cannot go unchallenged.

QUESTION TWO

WHETHER THE PLAINTIFF BY SUBMITTING HIS FEDERAL CLAIMS TO THE STATE COURT, WITHOUT RESERVATION, DEPRIVED HIM OF THE RIGHT TO RESORT TO THE FEDERAL DISTRICT COURT FOR A RESOLUTION OF THOSE CLAIMS.

ARGUMENT

At the hearing before the district court on July 16, 1970, counsel for the Appellees herein urged that said court lacked jurisdiction in the cause in light of the fact that the Appellant had already litigated the federal questions in the state courts of Florida and that, having suffered an adverse ruling, had appealed said ruling to the District Court of Appeal, First District, State of Florida. At that time, counsel for Appellant candidly admitted he did not reserve his federal claims. (App. 377) Of course, Appellant's abortive attempt to reserve his federal questions in the answer filed in the circuit court, a copy of which was mailed to the members of the Court on July 17, 1970, was too little, too late (App. 490)

What Appellant, in effect, sought to accomplish was to reserve his federal constitutional claims after having vol-

untarily submitted said claims to Florida's state courts, literally forcing them to rule upon the validity of those claims. He then sought to play off the state courts against the federal court hoping to secure a more favorable ruling in one than the other.

During the argument before the district court, Appellant's counsel suggested he had no option since Florida had elected the forum in which it was going to proceed against him. (App. 500) In truth and fact, a litigant has a choice whether to initially raise his federal claims in a state court or a federal court. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1965). So it is that if he chooses to reserve his federal claims for future action in federal courts, he should only give the state courts notice of his federal claims and not litigate them. Should he follow this procedure, he can, in effect, reserve his federal claims for presentation to a federal court. Id. In short, there is no way in which a litigant can be compelled to initially litigate his federal claims in state court.

In England supra, this Court unequivocally held the following:

"We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there and has them decided there, then...he has elected to forego his right to [litigate

them by a three judge panel]."
375 U.S. at 419

How Appellant could, in the face of that observation, thereafter seek to relitigate the issues already raised and acted upon by the state courts escapes Appellees.

The Appellee respectfully submits that the Appellant, without question, presented his federal constitutional claims and suffered an adverse ruling thereon, the correctness of which was then before the appellate court of Florida. Being dissatisfied with such ruling, he sought relief from the federal district court. England v. Louisiana Board of Medical Examiners, supra, clearly and unequivocally precludes such action. It matters not how he first arrived in the state courts or that the judgment is not "final" in the legal sense. What is crucial is that rather than reserving his claim, he tendered it and, having done so, obtained an adverse ruling appealable in nature. The Appellant's remedy was on direct appeal or by way of certiorari to this Court, not by a separate action seeking declaratory or injunctive relief. Brooks v. Briley, (D.C. Tenn. 1967), 274 F.Supp. 538), affirmed 391 U.S. 361. Accordingly, the district court properly denied injunctive relief.

CONCLUSION

The Appellees submit that the decision of the three-judge court was clearly correct and that they properly denied injunctive relief. The order appealed should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellees' Brief has been forwarded, via U. S. Mail, to

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Of Counsel for Appellant

this day of August, 1971

GEORGE R. GEORGIEFF
Assistant Attorney General

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APPENDIX

PLAINTIFFS TO FILE RETURNING PETITION AND, IF
FILED, RETURNED.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1971

ROBERT S. McDANIEL, JR.,
FRANK SCHAUH, G/A/PLAINTIFFS
AND MOVIES,

Appellants,

vs.

STATE OF FLORIDA ex rel.
FRANK SCHMITZ, as State
Attorney of the 12th
Judicial Circuit of the
STATE OF FLORIDA,

CASE NO. 40,334

Appellee.

Opinion filed July 9, 1971

An Appeal from the Circuit Court for Sarasota County, John-D.
Justice, Judge

Robert S. McDaniel, Jr., and Robert Eugene Smith, for
Appellants

Frank Schauh and William C. Strode, for Appellee

CARLTON, J.:

Appellants are owners and operators of a book store
located in the City of Sarasota. They appeal from an Order entered
by the Circuit Court, Sarasota County, through which appellants
were permanently enjoined from selling obscene or pornographic
materials, and permanently enjoined from further operation or
maintenance of their business so as to annoy the community. Our
jurisdiction vests by virtue of a ruling by the Circuit Court that

Fla. Stat. § 847.011 is constitutional. Article V, § 4(2), Florida

Constitution. We affirm this holding, but find that the permanent

Prior to October 16, 1969, several persons in the City of Sarasota, either independently or at the request of the Police Department, visited the appellants' Adult Book and Movie Store, and found themselves offended by the nature of the materials sold. On October 16, 1969, State Attorney Schaub filed a complaint seeking a temporary and a permanent injunction against the appellants' possession and sale of obscene materials, and against their continuation of this type of business at the Adult Book and Movie Store premises on the ground that as operated the Store constituted a public nuisance.

This was followed on October 17 by a Motion for a Temporary Restraining Order filed under Fla. Stat. § 447.011 on the theory that an apprehended violation would be committed if an immediate remedy was not afforded. This Motion was granted on October 23, 1969, on the basis of affidavits filed by police officers.¹ A hearing on the question of a permanent injunction was held on March 2, 1970. At that time, the State introduced into evidence certain publications known as Exhibits 1, 2 and 3 (not described in the record, or in the transcript of hearing, and not filed as part of the record on appeal), which were purchased prior to the filing of the complaint.

The State then proceeded to present ten witnesses who were to testify in relation to these Exhibits. After two persons had testified about purchases they had made and about their view of the materials sold at the Store, the litigants agreed that a stipulation could be entered as to what the remaining witnesses

¹The Circuit Court Judge who issued this Order also presided over the hearing on the Permanent Injunction. At the conclusion of the March 2, 1970, hearing on the latter injunction, the Judge orally issued a ruling that the Temporary Restraining Order was invalid. Appellants have not raised any question about this Temporary Restraining Order on appeal, and, therefore, we do not treat it here. The materials brought in as Exhibits in the Permanent Injunction hearing were purchased prior to the filing of the Complaint; and were not a part of any proceeding relating to the Temporary Restraining Order.

would say. The remainder of the proceedings was devoted to argument on the merits of the stipulated testimony and to the form of the injunctions which were to be entered by the Court. On March 3, 1970, the permanent injunctions were entered: one prohibited appellants from selling that which was obscene; the other permanently enjoined the operation of the Store as a nuisance.

Appellants now challenge the proceedings below on a number of points relating to the constitutionality of Fla. Stat. § 347.01 generally, certain aspects of the proceedings, and the validity of the injunctions issued by the Circuit Court. We think the statute is secure against a general attack on its constitutionality. United v. Davis, 202 So.2d 782 (Fla. 1967); Martin v. State of Florida, Case No. 40,159, filed May 23, 1971. The ruling of the Circuit Court on this question is hereby affirmed.

But we defer from treating specific constitutional arguments because we find that as a matter of law the proceedings below were constitutionally defective. The March 3, 1968, hearing on the question of a permanent injunction was a prior adversary hearing held in advance of a judicial determination of obscenity. This type of proceeding is constitutionally sound, and presents an eminently acceptable forum for determination of obscenity. Minneapolis Book Co. v. Ingram, 354 U.S. 439 (1957); United States v. Thirion-Swan (37) Photocopies, 57 LG 4518, ____ U.S. ____ (1971).

In the instant case, however, the State urged the use of a constitutionally inadequate standard for the determination of obscenity. The State built its presentation around Fla. Stat. § 347.01(10) as worded. Further it was the State's position that its witnesses:

"[A]ll agreed that all of the publications they examined at the appellants' premises were of a similar nature and that the dominant theme of each taken as a whole by the average citizen of the Sarnisota community, applying contemporary community standards, would appeal to prurient interests."

It is evident from a reading of the transcript that this was the obscenity concept accepted as determinative by the Court.² The appellants accepted a stipulation that the State's witnesses would all testify that the materials in the store were obscene under the above standard, but appellants protested that this was an improper standard and they, of course, were right. Fla. Stat. §847.011(10) was an obscenity test taken from Roth v. United States [decided with Albert v. California], 354 U.S. 476 (1957). Subsequently, the Roth test underwent elaboration in ensuing obscenity cases decided by the United States Supreme Court.

In State v. Berra, supra, Fla. Stat. §847.011(10) came under attack as constitutionally defective since not reflective of the Roth test's revision.

We reviewed the opinions elaborating Roth's criteria for obscenity and concluded:

"We have the view, however, that the Supreme Court did not intend to abrogate the Roth test. It should seem, therefore, that a conviction based on the Roth test as 'elaborated' in Memphis v. Goodrich, 388 U.S. 413 (1966) would -- or, at least would -- have a good chance of standing up under a due process attack made on it in the United States Supreme Court; and Subsection (10) of §847.011, supra, can and should be interpreted, and the words of our obscenity statute applied, in the light of the clarification or 'elaboration' of the Roth test made in Memphis, supra."

² At the conclusion of the hearing, the Circuit Court Judge said:

"My findings are going to be that the statute is constitutional. As written; that this material which has been presented in the way of evidence and which has been described in the testimony of the witnesses and the proffer, the stipulation between the parties, is such as is prohibited by the statute."

The standards asserted as proper by the State and accepted by the trial court below are those of Jack without more. The proper standards, as contained in Morriss, and as must be read into F. R. I. 7.01(10) are that:

These elements must concur: it must be established that (a) the dominant theme of the material, taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Because the exhibits below were condemned under a defective constitutional standard, it necessarily follows that the injunctions issued upon a consideration of the exhibits were defective and invalid as a matter of law.

Normally, we would enter a remand order for new proceedings at this juncture, but the nature of the injunctions entered below calls for further comment. First, the Circuit Court entered its Permanent Injunction relating to the sale of materials as follows:

ORDERED AND ADJUDGED that the Respondents, Marshall Books and John Litcher, cease and desist from selling, offering for sale or causing to be sold or offered for sale obscene or pornographic publications in violation of F.S.A. 347.011

The 14th Amendment of the United States Constitution requires that regulation of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression or publication. Marshall Books, Inc. v. Sullivan, 372 U.S. 58 (1963). The operation and effect of the method by which sale of publications is to be restrained must be very carefully defined. Cf. Shelton v. United States, 397 U.S. 913 (1950). We are of the view that a blanket injunction is constitutionally invalid because it

does not put the seller on notice as to what is prohibited, and thereby creates an unacceptable restraint upon his freedom to vend publications. Cf. Smith v. California, 361 U.S. 147 (1959); Franklin v. State of Maryland, 360 U.S. 51 (1965). See New Vienna Area Theatre v. State, 412 S.W.2d 690 (Tenn. 1967).

In Minersville Books, Inc., supra, a case involving a New York obscenity injunction statute akin to portions of Fla. Stat. § 7.011(7), the injunction proceeding affirmed by the United States Supreme Court was initiated by a complaint charging that a particular named obscene publication was displayed. In Marcus v. Search Warrant, 367 U.S. 717 (1961), at 735, the Supreme Court cited this aspect of Minersville with approval:

"Second, the restraints in Minersville Books, both temporary and permanent, ran only against the named publication; no categorical restraint against the distribution of all 'obscene' material was imposed on the defendants. There, comparable to the warrants here [which were nullified by reversal] which authorized a mass seizure and the removal of a broad range of items from circulation."

In addition to the injunction set out above being invalid in the instant case, we also find that the presentation of Exhibits 1, 2 and 3 below as representative of the contents of the Store was deficient; see Marcus v. Search Warrant, supra, note 28 at 735. Unless a defendant is willing to stipulate that particular exhibits are absolutely representative of the stock offered the public, one copy of each item sought to be suppressed must be entered into evidence.

The Circuit Court also entered a Permanent Injunction relating to the operation of the Store:

...AND WHEREAS that the operation of the Adult Book and Movie Store at 1437 Main Street in the City of Orlando, Florida, by its defendants constitutes the maintaining of a public nuisance and Matthew Rader and John W. Johnson are hereby enjoined from the further operation of or maintenance of said business premises so as to annoy the community and to become manifestly injurious to the morals or manners of the people.

This injunction is also invalid. A business involved in the distribution of publications cannot be declared a nuisance in this manner. See New York v. American News Co., 203 U.S. 657 (1901). The respective judgment, however, on the issue of whether a nuisance theory, in the proper circumstances, might be applicable to obscenity proceedings.

In reaching our conclusion that the proceedings below were constitutionally defective, and that the injunctions issued must be dissolved, this Court intimates no judgment as to the status of the materials involved herein. The injunctions are dissolved; the Circuit Court's ruling on the validity of Fla. Stat. § 7.011 is affirmed; and this cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

ADKINS and MCMAHON, JJ., and JOHNSON, District Court Judge, concur
ERVIN, J., concurs in part and dissents in part with opinion
BREWER, J., dissents with opinion
DREW (Retired) J., dissents with opinion

ERVIN, J., concurring in part and dissenting in part:

I agree that the injunctions should be dissolved, and agree that the obscenity test used was unconstitutional, but rather than remanding the case at this time for another trial, I believe this Court should retain jurisdiction until the Supreme Court of the United States considers Meyer v. Austin, 319 F. Supp. 457 (M.D. Fla. 1970).

DEKLE, J. - Dissenting:

We are "fiddling while Rome burns."

Another "Adult Book" Store stays open through the largesse of an appellate court in its expansive maze of legal jargon which seems designed to protect the offenders rather than the offended. The trial judge's order that defendant-operators cease and desist from selling obscene or pornographic publications violative of the statute,¹ is held insufficient for not sufficiently defining those publications, when they are in evidence and consist entirely of stark pictures "in living color." It "does not put the seller on notice as to what is prohibited," we say. These slick photographs of caressing male and female nudes leave no doubt whatsoever. The courts may be in doubt but these purveyors of pornography are not. We are not dealing with the uninformed.

The opinion requires that "one copy of each item sought to be suppressed must be entered into evidence." A clerk's office would become an "Adult Store" itself under this unreasonable standard. No effective control can be attained on such a basis.

The proofs here easily meet the MEMOIRS² test recited as elaborating ROTH.³ The wording of the trial court seems to be seized upon as not phrasing / ^{the test} in the exact wording in MEMOIRS. It is the substance of a trial court's ruling that controls, and not the wording or reasons given.⁴

I therefore dissent.

1. Fla. Stat. § 847.011(10), which our opinion upholds.

2. Memoirs v. Moss, 383 U.S. 413 (1966).

3. Roth v. U.S., 354 U.S. 476 (1957).

4. Pierce v. Scott, 142 Fla. 501, 195 So. 160 (1940); St. Moritz Hotel v. Daughtry, Supreme Ct. Case No. 40,530, Opinion filed June 9, 1971.

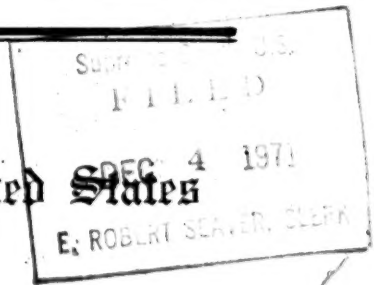
DREW (Ret.) J., dissenting:

I would affirm trial court.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No: 70-27



ROBERT MITCHUM, d/b/a THE BOOK MART,
Appellant,

v.

CLINTON E. FOSTER, As Prosecuting Attorney of Bay
County, Florida; M.J. "DOC" DAFFIN, as Sheriff of
Bay County, Florida; and THE HONORABLE W. L.
FITZPATRICK, as Circuit Judge of the Fourteenth
Judicial Circuit in and for Bay County, Florida,

Appellee.

On Appeal from the United States District Court for the
Northern District of Florida Pensacola Division

BRIEF FOR THE STATE OF NEW JERSEY
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Appellee.

On Appeal from the United States District Court for the
Northern District of Florida Pensacola Division

**MOTION TO FILE AMICUS CURIAE BRIEF
OUT OF TIME**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

The State of New Jersey respectfully moves for leave
to file out of time the within brief, *amicus curiae* in this
case.

The State of Florida, subsequent to the filing of its brief with this Court, requested the State of New Jersey to join as *amicus curiae*. Since that time the *amicus* has been preparing its brief for submission to this Court.

The *amicus* has a special interest in the disposition of this case, because it involves the validity of the position previously taken by the United States Court of Appeals for the Third Circuit on the question of whether the Civil Rights Act, 42 U.S.C. §1983, is an exception to the Anti-Injunction Act, 28 U.S.C. §2283. It is submitted that the Third Circuit's position is erroneous and that a decision on the matter by this Court is needed in the interest of the orderly administration of criminal justice.

For this reason the *amicus* respectfully requests this Court to grant its motion to file this brief out of time.

Respectfully submitted,

GEORGE F. KUGLER, JR.,

*Attorney General of the State of
New Jersey,*

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State House Annex,

Trenton, New Jersey 08625

By: JOHN DE CICCIO,

Deputy Attorney General.

Division of Criminal Justice.

Dated: December 2, 1971.

Statement of Interest of the *Amicus Curiae*

The State of New Jersey, *amicus curiae*, by its Attorney General, respectfully submits this brief in the above-captioned appeal in support of the position of appellees.

The interest of the *amicus* in this appeal arises from the view which appears to have currency only in the Third Circuit, to wit, that Title 42 U.S.C. §1983 (the Civil Rights Act) is an exception to the general proscription against enjoining pending state proceedings found in the Anti-Injunction Act, 28 U.S.C. §2283. Because of this view, which the *amicus* regards as erroneous, the *amicus* has been forced to engage in protracted litigation, albeit successfully, in defense of duly instituted state proceedings.

It now appears in light of *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U. S. 281 (1970) and *Younger v. Harris*, 401 U. S. 37 (1971) that in every instance where the Third Circuit has entertained an action to enjoin proceedings in the state courts of New Jersey, e.g., *Cooper v. Hutchinson*, 184 F. 2d 119 (3d Cir. 1950) and *DeVita v. Sills*, 422 F. 2d 1172 (3d Cir. 1970), that court failed to recognize that the proper threshold inquiry was whether plaintiff was able to show those elements which courts of equity have been traditionally required to find in order to intercede in pending proceedings in another court. In the Third Circuit's view, the key to finding whether such actions could be entertained revolved around the question of whether §1983 fell into the express authorization exception to the Anti-Injunction Act.

In both *Cooper v. Hutchinson* and *DeVita*, plaintiffs, were ultimately denied relief under the "abstention doctrine": in effect the court recognized that an adequate remedy at law was available in the state courts. How-

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ever, in the interim state court proceedings were disrupted and the State was required to expend considerable resources in defense of claims ultimately found to be lacking in equity.

It is the view of the *amicus* that a proper recognition by the Third Circuit of the particularized remedial ambitions of the Civil Rights Act, even apart from its failure to treat the equitable considerations as the proper threshold inquiry, should have led to summary dismissals in both of these cases. It is for this reason that the *amicus* submits this brief in support of appellee's position.

ARGUMENT

POINT I

The notion that 42 U.S.C. §1983 falls within the "express authorization" exception of the Anti-Injunction Act, 28 U.S.C. §2283, is at odds with the historical conception of the Civil Rights Act as well as the plain language of the Anti-Injunction Act and the case law interpreting that act.

The conclusion that the Civil Rights Act, 42 U.S.C. §1983, must fall within the purview of the general proscription of the Anti-Injunction Act, 28 U.S.C. §2283, rather than any of the stated exceptions to that Act, is mandated by examination of the very special remedial ambitions Congress had in mind in enacting the Civil Rights Act. It is widely acknowledged that:

The distinguishing characteristic of the wrongs prompting the statute [42 U.S.C. §1983] was that they were directed not so much against individuals

as against persons because they shared characteristics defining a class. Note, "Limiting Section 1983 in the Wake of *Monroe v. Pape*," 82 *Harv. L. Rev.* 1486, at 1495 (1969).

This commentator likewise observed that throughout the legislative history of the Civil Rights Act the focus was upon class deprivations, not individual torts. *Ibid.*

In *Younger v. Harris*, *supra*, the Court provided a précis of the general province of federal equity courts to interpose themselves in pending state proceedings, i.e., instances where:

"... the threat to plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.* 91 S. Ct., at 751.

This declaration nurtures a critical distinction germinated in *Dombrowski v. Pfister*, 380 U. S. 479 (1965). At first blush the *Dombrowski* decision would appear to lend credence to the notion that 42 U.S.C. §1983 did in fact embody a policy decision to permit the enjoining of pending state criminal proceedings in cases involving allegations of deprivation of federal rights.

However, *Younger* may be seen as having recognized that in *Dombrowski* it was not the threat or reality of prosecution which furnished a basis for federal equitable relief. Indeed, if this had been the problem in *Dombrowski*, it could have been adequately dealt with in a "single criminal prosecution." *Id.* 91 S. Ct., at 751. State courts are constitutionally bound to enforce such federally protected rights. *Testa v. Katt*, 330 U. S. 386 (1947). Moreover, the Court has recognized the adequacy of state enforcement if complete relief is available within the sub-

sisting state proceeding. *Atlantic Coast Line R. Co., supra*, 398 U. S. at 297.

The need for federal equitable relief in *Dombrowski* was to provide a remedy for those deprivations which could not be dealt with and requited in any contemplated state proceeding. The notion of "chilling effect" on First Amendment rights given currency in *Dombrowski* may be seen as one species of deprivation not amenable to relief in a state court of law. The contours of that deprivation extended far beyond the individual plaintiff's own interests.

Relief in a *Dombrowski* situation clearly would not be affected were this Court to declare that §1983 does not fall within a specific exception to the Anti-Injunction Act. The problem arises in cases such as the present one and in cases such as *Cooper v. Hutchinson* and *DeVita v. Sills, supra*, where the plaintiffs sought to employ the Civil Rights Act as a springboard to pursue particular and individualized relief in what was thought by them to be the more hospitable atmosphere of the federal forum.

Unlike the *Dombrowski* situation, *Cooper* and *DeVita* are typical of the situations in which the question of §1983, as an exception to the Anti-Injunction Act has significance. Stripped of rhetorical flourish, all of these cases seem to reduce to instances where one or several plaintiffs are seeking to create a barrier between themselves and the success of pending state proceedings against them.

In a situation such as *Dombrowski* the plaintiff seeks to do something more, that is, he seeks in asserting his federally protected rights to protect interests that are actually broader than those implicated and "threatened"

by state proceedings. Such interests, to the extent that they fall outside the embrace of prosecution, may be protected by injunctive relief without creating an interference with the state proceeding. See *Lewis v. Kugler*, — F. 2d —, Civ. No. 71-1227 (3d Cir. 1971) (slip op. 10-11), cf. *Dombrowski*, *supra* 380 U. S. at 485-486.

Similarly, if rights have been transgressed but there is no pending state proceeding the plaintiff does not have the opportunity to be made whole in the state court. The doctrine of *Monroe v. Pape*, 365 U. S. 167 (1961), that an action for damages under §1983 is a supplemental remedy to that available in the state court, recognizes that particularly where the only pending state proceeding is criminal, the state forum does not stand ready to make the plaintiff whole in money damages under a tort theory. Thus, to award damages in such a case leads to no interference or "short circuiting".

On the other hand, *Younger*, *supra*, 91 S. Ct. at 755-756 (concurring opinion) (footnote) and *Atlantic Coast Line R. Co.*, *supra*, make clear that in a case where abstention would previously have not been required, i.e., where the federal court felt the state courts had wrongly decided a federal question and would decide the same question wrongly against plaintiff, the federal court may no longer enjoin a pending state prosecution. See *Karp v. Collins*, 310 F. Supp. 627 (D.N.J. 1970), *vacated and remanded for reconsideration in light of Younger v. Harris*, *sub. nom. Kugler v. Karp*, 91 S. Ct. 933 (1971), *dismissed* — F. Supp. — (D.N.J. 1971).

Aside from a case of this type, there does not appear to be any other situation where the availability of relief would actually depend on finding that §1983 is an exception to §2283. The reason for this is apparent;

it appears that relief could not be forthcoming in the other situations in which jurisdiction might hinge exclusively on the acceptance of §1983 as an exception: (a) in a case presenting a federal question not previously resolved in the state courts, arising out of pending state action, the abstention doctrine would bar resolution of the question by the federal court; (b) in a case presenting a federal question previously decided "correctly" by the state courts, i.e., in a manner favorable to the plaintiff, there would be no need for federal intervention and the federal court would likewise abstain. In other words, there does not appear to be any situation where relief on the merits could follow an invocation of jurisdiction based solely on §1983.

Hence, from a practical standpoint, it can hardly be said that the efficacy of 42 U.S.C. §1983 is in any way dependent upon a recognition that that provision provides an exception to the general proscription of the Anti-Injunction Act. Therefore, there is no realistic basis for contending that failure to recognize the Civil Rights Act as an exception to that proscription would be incompatible with Congress's intention in passing that Act.

Viewed another way, it seems that in every instance where the question of §1983 as an exception would loom as critical, i.e., where the relief sought is no broader than the individual plaintiff, or plaintiffs' avoidance of the possibility of a judgment of conviction in a state prosecution, the threshold requirement for invoking federal equity jurisdiction (an inability to remove a "threat" to federally protected rights) would be absent. Thus, in actuality entertaining such an action on the basis of §1983 would involve a disregard of the prerequisites to entertaining an action under the stated exceptions or under the "irreparable injury" exception. *Younger, supra*, 91 S. Ct. at 750. This would be untenable.

In other areas it appears that in every instance where federal courts have recognized exceptions to the general proscription of the Anti-Injunction Act, apart from the stated exceptions, such exceptions have been rationalized on the basis that they arose out of subsequent acts of Congress specifically authorizing particular injunctive relief which specific authorizations would be rendered nugatory were they to be limited by the general proscription of the Anti-Injunction Act. See *Baines v. City of Danville*, 337 F.2d 579, 587 (1964) *cert. denied sub. nom. Chase v. McCain*, 381 U.S. 939 (1965). Recently this Court repudiated most of these "implied" judicial exceptions except in those few cases where to not recognize such exceptions would amount to a virtual abandonment of the legislation in question. *Atlantic Coast Line R. Co., supra*, 398 U.S. at 287.

Toucey v. New York Life Insurance Company, 314 U.S. 118 (1941) may be regarded as a seminal case in this area. There it was held that the lower federal courts could not enjoin the relitigation in the state court of issues fully litigated in the federal courts. In reaching this decision, Mr. Justice Frankfurter for the Court found that most exceptions to the Anti-Injunction Act were necessarily inferred from other federal legislation. The exceptions were listed: the bankruptcy exception; the interpleader exception arising from the Interpleader Act of 1826; the removal exception emanating from the removal acts of 1789; the limitation of ship owners liability resulting from an 1851 statute; and the exception created by the Frazier-Lemke Act.

Porter v. Dicken, 328 U.S. 253 (1946) recognized the creation of another statutory exception in the Emergency Price Control Act of 1942. This case represents

the sole instance wherein this Court has held that a general cause of action for an injunction could be construed as an exception to the Anti-Injunction Act. Because of the particular exigencies prompting the passage of the Price Control Act of 1942 as well as the peculiar facts of the *Porter* case and the subsequent revision of 28 U.S.C. §2283 in 1948, *Porter* offers no support for the proposition that a grant of general equitable jurisdiction thereby constitutes an exception to §2283. Indeed, the fact that *Porter* was clearly based on the *sui generis* nature of the price control problem militates in favor of the conclusion that in the case of less particularized federal legislation such general grants are not to be construed to constitute an exception to §2283. Moreover, in *Porter*, the moving party was in actuality the United States, for whom a special rule has developed, see *infra*.

In 1948 the terms of the Anti-Injunction Act were recast in a form which survives to this day. At that time Congress added the phrase, "except as expressly authorized by Congress" replacing the only exception obtained in the earlier formulation (dealing with bankruptcy matters). The revisor's note indicates that this change was designed to continue the bankruptcy exception, as well as to recognize other statutory exceptions which Congress had accomplished without expressly amending the Act, and provide for further exceptions which Congress might specifically authorize in the future. See H.R. Rep. No. 308, 80th Cong., 1st Sess. A 181. In this configuration the Act has been strictly construed by this Court. *Atlantic Coast Line R. Co.*, *supra* 398 U.S. at 297.

Thus, in *Amalgamated Clothing Workers v. Richmond Bros.*, 348 U.S. 511 (1955), the Court stated that the revision of 1948 "made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisa-

tion." *Id.* 348 U.S., at 514. The thrust of *Amalgamated Clothing Workers* was clear. The Court would recognize no judicially implied exceptions to the revised Anti-Injunction Act although decisions under the earlier formulation had at least payed lip-service to a welter of such exceptions.

Leiter Minerals v. United States, 353 U.S. 220 (1957) represents no departure from *Amalgamated Clothing Workers*, *supra*. Of particular pertinence to this discussion was the fact that the gravamen of *Leiter Minerals* was the distinction drawn between threats of irreparable injury to the national welfare, *i.e.*, where the United States was the moving party, as opposed to situations in which the collision of the Anti-Injunction Act with 42 U.S.C. §1983 inevitably occurs, that is, where individual plaintiffs seek to litigate defenses to state court proceedings in the federal forum.

The latest chapter in the history of the Anti-Injunction Act was written by this Court in *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, *supra*. Therein, this Court again took great pains to point out the stringency with which §2283 is to be applied by the federal courts. The Court rejected the notion that the "clear cut" statutory prohibition of §2283 was merely an admonitory declaration of the principle of comity. The Court found that section to be "a binding rule on the power of the federal courts," not to be avoided even though the state proceedings in question might "interfere with a protected federal right." *Id.*, 398 U.S. at 287, 294. 7

Echoing its earlier statement in *Amalgamated Clothing Workers*, *supra*, the Court stated in *Atlantic Coast Line R. Co.*, *supra*:

"... any injunction against a state court proceeding otherwise proper must be based on one of the specific exceptions to §2283 if it is to be upheld... [T]he exceptions should not be enlarged by loose statutory construction." *Id.*, 398 U.S. at 287.

Thus, "expressly authorized by act of Congress" means authorized in "black and white" by literal terms of the statute. There is no such literal authorization in 42 U.S.C. §1983. This fact alone would militate against a finding that the Civil Rights Act falls within the "expressly authorized" exception.

It should be noted that on several occasions since 1948, Congress has legislated in the field of civil rights but has not seen fit to alter the language of §1983 to incorporate language of explicit authorization. While Congress has expanded the frontiers of civil rights legislation it has done so in a manner consistent with the original group-oriented conception of the law with a particular focus on the area of racial, religious and ethnic discrimination. To have modified §1983 so as to provide an express authorization would have been to depart from the focus of civil rights legislation.

As noted, as a practical matter, the §1983-§2283 combination only has real significance where the gravamen of the relief sought in the federal court is protection against the possible effect of a judgment adverse to the plaintiff in the pending state court action. In such cases it is plain that the plaintiff cannot claim to be a genuine class representative. In such situations the nature of the relief sought is alien to the original conception of the Civil Rights Act as a mechanism for the protection of groups or classes, which by definition must necessarily extend beyond similarly situated defendants in other state proceedings.

It is respectfully submitted that it is the distortion of the original concept of the Civil Rights Act, implicit in any case where an individual plaintiff or series of plaintiffs seeks particularized relief from pending state prosecution by asserting §1983 as an exception, which has led to the ultimate failure of such plaintiffs to obtain relief in cases where there was no "class" interest implicated (in the absence of some other element such as "irreparable injury" or "extraordinary circumstances").

These conclusions appear to be amply supported by the analysis of the Fourth Circuit in *Baines v. City of Danville, supra*, where the court likewise found that §1983 was not an exception to the Anti-Injunction Act. The *Baines* decision is notable as the first instance wherein a federal court of appeals rendered a detailed analysis of §1983 in tandem with §2283. The decision in *Baines* pivoted on a comparison of the nature of the remedy provided for in §1983 contrasted with the judicial limitation imposed by §2283. *Baines* strongly indicates that in a case seeking essentially class relief of the type envisaged in the original Civil Rights Act, there is no collision between the availability of the remedy provided for in §1983 and the jurisdictional limitations imposed by §2283.

In contrast to *Baines*, the single circuit which had previously concluded that §1983 was an exception to §2283 rendered its view without any explanation whatsoever. See *Cooper v. Hutchinson, supra*. As *Younger, supra*, makes clear, the reasoning of the *Baines* decision remained unaffected by *Dombrowski v. Pfister, supra*.

While relying on the history of the Anti-Injunction Act, as well as principles of comity, the foundation upon which the *Baines* decision rested was the court's analysis of the general jurisdictional grant of §1983 contrasted with the

Anti-Injunction Act's explicit prohibition of the exercise of general equitable jurisdiction in pending state proceedings. The reasoning of the *Baines* court may be capsulized as follows:

"In strong contrast is the Civil Rights Act. It creates a federal cause of action, but with no suggestion, explicit or implicit, that appropriate relief shall include an injunction which another act of Congress [28 U.S.C. §2823] forbids. The substantive right, in many situations may call for equitable relief, . . . but only by a general jurisdictional grant. Creation of a general equity jurisdiction is in no sense antipathetic to statutory or judicially recognized limitations upon its exercise. . . . [T]here is no incompatibility between a generally created equity jurisdiction and particularized limitations which restrict a chancellor's power for defining the limits of his discretion.

. . . .

"If every grant of general equity jurisdiction created an exception to the Anti-Injunction Statute, the statute would be meaningless." *Baines v. Danville*, *supra* at 589.

A number of other courts have adopted the rationale of the *Baines* case. See *Cole v. Graybeal*, 313 F. Supp. 48 (W. D. Vir. 1970); *208 Cinema v. Vergari*, 298 F. Supp. 1175 (S. D. N. Y. 1969); *Chinn v. Johnson*, 294 F. Supp. 909 (S. D. Miss. 1969); *Nichols v. Vance*, 293 F. Supp. 680 (S. D. Tex. 1968); *Brooks v. Briley*, 274 F. Supp. 538 (D. Tenn. 1967) *aff'd per curiam*, 391 U. S. 361 (1968). See also, Note, "Incompatibility—The Touchstone of Section 2283's Express Authorization Exception", 50 *U. Va. L. Rev.* 1404 (1964).

The Second Circuit has also had occasion to examine the application of §2283 to the authorization of federal injunctions contained in the Securities Exchange Act, 15 U.S.C. §78(u) when the S.E.C. determines that the Act is about to be violated. In *Verntron Corp. v. Benjamin*, 440 F. 2d 105 (2d Cir. 1971) cert. denied — U. S. — (1971) the court found that in spite of the rather explicit provisions for relief in the statute, that the provision contained no reference to §2283 or to injunctive relief against pending state proceedings, and therefore the Securities Exchange Act did not provide an exception to §2283. Since the language in the Securities Act is certainly more explicit than that in 42 U.S.C. §1983, it would appear to follow *a fortiori*, that under this reasoning an exception could not be found to exist under the Civil Rights Act.

In the final analysis a federal court's interference in a pending state prosecution places that court in the role of a reviewing court above the highest court of that particular state. However, this is a power which Congress has reserved to this Court under 28 U.S.C. §1257, and even that power is limited to "final judgments." "The lower federal courts possess no power whatever to sit in direct review of state court decisions." *Atlantic Coastline, supra*, 398 U. S. at 297. Yet, by allowing a lower federal court to review the action of a state court under the purported Civil Rights exception to the Anti-Injunction Act, that court in effect, arrogates to itself a power which even this Court does not have, namely the power to review an interlocutory order of a state court. See *Younger, supra*, 91 S. Ct. at 755-756 (concurring opinion) (fn).

It should be further noted that after a federal court assumes jurisdiction and then decides to abstain, it may

not be argued that the doctrine of abstention serves as an adequate substitute for the Anti-Injunction Act in Civil Right actions. Once the power to intercede in pending state court proceedings is recognized, some courts will exercise that power even under the most inappropriate of circumstances. See *DeVita v. Sills*; *supra*, for an excellent example of the futility and inappropriateness of a federal court's intervention in a pending state court proceeding where the end result was the abstention of the interceding court.

It is significant to note that two exceptions to the Anti-Injunction Act are: (1) where the injunction would be necessary in aid of the jurisdiction of the federal courts; or (2) when the injunction is necessary to protect or effectuate the judgment of a federal court. See §2283. When a state court proceeding is sought to be enjoined this proceeding should be entitled to the same protection of its judgments or of its jurisdiction that is afforded to the federal courts. The courts of the individual states should be allowed to maintain an action already commenced without interruption and thereby accorded the dignity of retaining jurisdiction so as to enter the proper judgment. The argument is unfounded that federally protected rights will be trampled upon if such a procedure is not followed.

In determining whether 42 U.S.C. §1983 constitutes an exception to the Anti-Injunction Act the suggestion of Mr. Justice Black is relevant:

Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of §2283 it-

self implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion. *Atlantic Coastline R. Co., supra*, 398 U.S. at 297.

The *amicus* respectfully submits that adherence to this proposition mandates the conclusion that 42 U.S.C. §1983 is not to be considered an exception to the Anti-Injunction Act.

CONCLUSION

For the reasons expressed herein it is respectfully submitted that Title 42 U.S.C. §1983 of the Civil Rights Act does not constitute an exception to the provisions of the Anti-Injunction Act, Title 28 U.S.C. §2283.

Respectfully submitted,

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Syllabus

MITCHUM, DBA BOOK MART v. FOSTER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA

No. 70-27. Argued December 13, 1971—Decided June 19, 1972

Title 42 U. S. C. § 1983, which authorizes a suit in equity to redress the deprivation under color of state law "of any rights, privileges, or immunities secured by the Constitution . . .," is within that exception of the federal anti-injunction statute, 28 U. S. C. § 2283, that provides that a federal court may not enjoin state court proceedings "except as expressly authorized by Act of Congress." And in this § 1983 action, though the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding (cf. *Younger v. Harris*, 401 U. S. 37, and companion cases) are not questioned, the District Court is held to have erred in holding that the anti-injunction statute absolutely barred its enjoining a pending state court proceeding under any circumstances whatsoever. Pp. 228-243.

315 F. Supp. 1387, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which all members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case. BURGER, C. J., filed a concurring opinion, in which WHITE and BLACKMUN, JJ., joined, *post*, p. 243.

Robert Eugene Smith argued the cause for appellant. With him on the brief was *Paul Shimek, Jr.*

Raymond L. Marky, Assistant Attorney General of Florida, argued the cause for appellees. With him on the brief were *Robert L. Shevin*, Attorney General, and *George R. Georgieff*, Assistant Attorney General.

George F. Kugler, Jr., Attorney General of New Jersey, and *Michael R. Perle* and *John DeCicco*, Deputy Attorneys General, filed a brief for the State of New Jersey as *amicus curiae*.

MR. JUSTICE STEWART delivered the opinion of the Court.

The federal anti-injunction statute provides that a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."¹ An Act of Congress, 42 U. S. C. § 1983, expressly authorizes a "suit in equity" to redress "the deprivation," under color of state law, "of any rights, privileges, or immunities secured by the Constitution"² The question before us is whether this "Act of Congress" comes within the "expressly authorized" exception of the anti-injunction statute so as to permit a federal court in a § 1983 suit to grant an injunction to stay a proceeding pending in a state court. This question, which has divided the federal courts,³ has lurked in the background of many of our recent cases, but we have not until today explicitly decided it.⁴

¹ 28 U. S. C. § 2283.

² The statute provides in full: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

³ Compare *Cooper v. Hutchinson*, 184 F. 2d 119 (CA3) (§ 1983 is an "expressly authorized" exception), with *Baines v. City of Danville*, 337 F. 2d 579 (CA4) (§ 1983 is not an "expressly authorized" exception).

⁴ See *Dombrowski v. Pfister*, 380 U. S. 479, 484 n. 2; *Cameron v. Johnson*, 390 U. S. 611, 613 n. 3; *Younger v. Harris*, 401 U. S. 37, 54. See also *Lynch v. Household Finance Corp.*, 405 U. S. 538, 556; *Roudebush v. Hartke*, 405 U. S. 15.

In *Younger*, *supra*, MR. JUSTICE DOUGLAS was the only member of the Court who took a position on the question now before us. He expressed the view that § 1983 is included in the "expressly author-

I

The prosecuting attorney of Bay County, Florida, brought a proceeding in a Florida court to close down the appellant's bookstore as a public nuisance under the claimed authority of Florida law. The state court entered a preliminary order prohibiting continued operation of the bookstore. After further inconclusive proceedings in the state courts, the appellant filed a complaint in the United States District Court for the Northern District of Florida, alleging that the actions of the state judicial and law enforcement officials were depriving him of rights protected by the First and Fourteenth Amendments. Relying upon 42 U. S. C. § 1983,⁵ he asked for injunctive and declaratory relief against the state court proceedings, on the ground that Florida laws were being unconstitutionally applied by the state court so as to cause him great and irreparable harm. A single federal district judge issued temporary restraining orders, and a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284. After a hearing, the three-judge court dissolved the temporary restraining orders and refused to enjoin the state court proceeding, holding that the "injunctive relief sought here

ized exception to § 2283" 401 U. S., at 62. Cf. *id.*, at 54. (STEWART, J., joined by Harlan, J., concurring); *Perez v. Ledesma*, 401 U. S. 82, 93, at 120 n. 14 (separate opinion of BRENNAN, J., joined by WHITE and MARSHALL, JJ.).

⁵ Federal jurisdiction was based upon 28 U. S. C. § 1343 (3). The statute states in relevant part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . ."

as to the proceedings pending in the Florida courts does not come under any of the exceptions set forth in Section 2283. It is not expressly authorized by Act of Congress, it is not necessary in the aid of this court's jurisdiction, and it is not sought in order to protect or effectuate any judgment of this court." 315 F. Supp. 1387, 1389. An appeal was brought directly here under 28 U. S. C. § 1253,⁶ and we noted probable jurisdiction. 402 U. S. 941.

II

In denying injunctive relief, the District Court relied on this Court's decision in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281. The *Atlantic Coast Line* case did not deal with the "expressly authorized" exception of the anti-injunction statute,⁷ but the Court's opinion in that case does bring into sharp focus the critical importance of the question now before us. For in that case we expressly rejected the view that the anti-injunction statute merely states a flexible doctrine of comity,⁸ and made clear that the statute imposes an absolute ban upon the issuance of a federal injunction against a pending

⁶ The statute provides: "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

⁷ At issue were the other two exceptions of the anti-injunction statute: "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 288.

⁸ See *First National Bank & Trust Co. v. Village of Skokie*, 173 F. 2d 1; *Baines*, 337 F. 2d, at 593. See also Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale L. J. 1169, 1194 (1933).

state court proceeding, in the absence of one of the recognized exceptions:

"On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondents here have intimated that the Act only establishes a 'principle of comity,' not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention. . . . [We] hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. . . ." 398 U. S. 286-287.

It follows, in the present context, that if 42 U. S. C. § 1983 is not within the "expressly authorized" exception of the anti-injunction statute, then a federal equity court is wholly without power to grant any relief in a § 1983 suit seeking to stay a state court proceeding. In short, if a § 1983 action is not an "expressly authorized" statutory exception, the anti-injunction law absolutely prohibits in such an action all federal equitable intervention in a pending state court proceeding, whether civil or criminal, and regardless of how extraordinary the particular circumstances may be.

Last Term, in *Younger v. Harris*, 401 U. S. 37, and its companion cases,⁹ the Court dealt at length with the subject of federal judicial intervention in pending

⁹ *Samuels v. Mackell*, 401 U. S. 66; *Boyle v. Landry*, 401 U. S. 77; *Perez v. Ledesma*, 401 U. S. 82; *Dyson v. Stein*, 401 U. S. 200; *Byrne v. Karalezis*, 401 U. S. 216.

state criminal prosecutions. In *Younger* a three-judge federal district court in a § 1983 action had enjoined a criminal prosecution pending in a California court. In asking us to reverse that judgment, the appellant argued that the injunction was in violation of the federal anti-injunction statute. 401 U. S., at 40. But the Court carefully eschewed any reliance on the statute in reversing the judgment, basing its decision instead upon what the Court called "Our Federalism"—upon "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 401 U. S., at 41, 44.

In *Younger*, this Court emphatically reaffirmed "the fundamental policy against federal interference with state criminal prosecutions." 401 U. S., at 46. It made clear that even "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." 401 U. S., at 54. At the same time, however, the Court clearly left room for federal injunctive intervention in a pending state court prosecution in certain exceptional circumstances—where irreparable injury is "both great and immediate," 401 U. S., at 46, where the state law is "flagrantly and patently violative of express constitutional prohibitions," 401 U. S., at 53, or where there is a showing of "bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief." 401 U. S., at 54. In the companion case of *Perez v. Ledesma*, 401 U. S. 82, the Court said that "[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and, perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending

state prosecutions appropriate." 401 U. S., at 85. See also *Dyson v. Stein*, 401 U. S. 200, 203.

While the Court in *Younger* and its companion cases expressly disavowed deciding the question now before us—whether § 1983 comes within the "expressly authorized" exception of the anti-injunction statute, 401 U. S., at 54, it is evident that our decisions in those cases cannot be disregarded in deciding this question. In the first place, if § 1983 is not within the statutory exception, then the anti-injunction statute would have absolutely barred the injunction issued in *Younger*, as the appellant in that case argued, and there would have been no occasion whatever for the Court to decide that case upon the "policy" ground of "Our Federalism." Secondly, if § 1983 is not within the "expressly authorized" exception of the anti-injunction statute, then we must overrule *Younger* and its companion cases insofar as they recognized the permissibility of injunctive relief against pending criminal prosecutions in certain limited and exceptional circumstances. For, under the doctrine of *Atlantic Coast Line*, the anti-injunction statute would, in a § 1983 case, then be an "absolute prohibition" against federal equity intervention in a pending state criminal or civil proceeding—under any circumstances whatever.

The *Atlantic Coast Line* and *Younger* cases thus serve to delineate both the importance and the finality of the question now before us. And it is in the shadow of those cases that the question must be decided.

III

The anti-injunction statute goes back almost to the beginnings of our history as a Nation. In 1793, Congress enacted a law providing that no "writ of injunction be granted [by any federal court] to stay proceedings

in any court of a state. . . ." Act of March 2, 1793; 1 Stat. 335. The precise origins of the legislation are shrouded in obscurity,¹⁰ but the consistent understand-

¹⁰ "The history of this provision in the Judiciary Act of 1793 is not fully known. We know that on December 31, 1790, Attorney General Edmund Randolph reported to the House of Representatives on desirable changes in the Judiciary Act of 1789. Am. State Papers, Misc., vol. 1, No. 17, pp. 21-36. The most serious question raised by Randolph concerned the arduousness of the circuit duties imposed on the Supreme Court justices. But the Report also suggested a number of amendments dealing with procedural matters. A section of the proposed bill submitted by him provided that 'no injunction in equity shall be granted by a district court to a judgment at law of a State court.' *Id.*, p. 26. Randolph explained that this clause 'will debar the district court from interfering with the judgments at law in the State courts; for if the plaintiff and defendant rely upon the State courts, as far as the judgment, they ought to continue there as they have begun. It is enough to split the same suit into one at law, and another in equity, without adding a further separation, by throwing the common law side of the question into the State courts, and the equity side into the federal courts.' *Id.*, p. 34. The Report was considered by the House sitting as a Committee of the Whole, and then was referred to successive special committees for further consideration. No action was taken until after Chief Justice Jay and his associates wrote the President that their circuit-riding duties were too burdensome. American State Papers, Misc., vol. 1, No. 32, p. 51. In response to this complaint, which was transmitted to Congress, the Act of March 2, 1793, was passed, containing in § 5, *inter alia*, the prohibition against staying state court proceedings.

"Charles Warren in his article *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 347, suggests that this provision was the direct consequence of Randolph's report. This seems doubtful, in view of the very narrow purpose of Randolph's proposal, namely, that federal courts of equity should not interfere with the enforcement of judgments at law rendered in the state courts. See Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale L. J. 1169, 1171, n. 14.

"There is no record of any debates over the statute. See 3 Annals of Congress (1791-93). It has been suggested that the provision reflected the then strong feeling against the unwarranted intrusion

ing has been that its basic purpose is to prevent "needless friction between state and federal courts." *Oklahoma Packing Co. v. Gas Co.*, 309 U. S. 4, 9. The law remained unchanged until 1875, when it was amended to permit a federal court to stay state court proceedings that interfered with the administration of a federal bankruptcy proceeding.¹¹ The present wording of the legislation was adopted with the enactment of Title 28 of the United States Code in 1948.

Despite the seemingly uncompromising language of the anti-injunction statute prior to 1948, the Court soon

of federal courts upon state sovereignty. *Chisholm v. Georgia*, 2 Dall. 419, was decided on February 18, 1793, less than two weeks before the provision was enacted into law. The significance of this proximity is doubtful. Compare Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 347-348, with *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 291-292. Much more probable is the suggestion that the provision reflected the prevailing prejudices against equity jurisdiction. The *Journal of William Maclay* (1927 ed.), chronicling the proceedings of the Senate while he was one of its members (1789-1791), contains abundant evidence of a widespread hostility to chancery practice. See especially, pp. 92-94, 101-06 (debate on the bill that became Judiciary Act of 1789). Moreover, Senator Ellsworth (soon to become Chief Justice of the United States), the principal draftsman of both the 1789 and 1793 Judiciary Acts, often indicated a dislike for equity jurisdiction. See Brown, *Life of Oliver Ellsworth* (1905 ed.) 194; *Journal of William Maclay* (1927 ed.) 103-04; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 96-100." *Toucey v. New York Life Ins. Co.*, 314 U. S. 118, 130-132.

See also Note, 38 U. Chi. L. Rev. 612 (1971); 1A J. Moore, *Federal Practice* 2302 (1965); H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 1075-1078 (1953); Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 Mich. L. Rev. 1145 (1932).

¹¹ As so amended, the statute provided that state court proceedings could be enjoined "where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. Stat. § 720 (1874).

recognized that exceptions must be made to its blanket prohibition if the import and purpose of other Acts of Congress were to be given their intended scope. So it was that, in addition to the bankruptcy law exception that Congress explicitly recognized in 1875, the Court through the years found that federal courts were empowered to enjoin state court proceedings, despite the anti-injunction statute, in carrying out the will of Congress under at least six other federal laws. These covered a broad spectrum of congressional action: (1) legislation providing for removal of litigation from state to federal courts,¹² (2) legislation limiting the liability of shipowners,¹³ (3) legislation providing for federal interpleader actions,¹⁴ (4) legislation conferring federal jurisdiction over farm mortgages,¹⁵ (5) legisla-

¹² See *French v. Hay*, 22 Wall. 250; *Kline v. Burke Construction Co.*, 260 U. S. 226. The federal removal provisions, both civil and criminal, 28 U. S. C. §§ 1441-1450, provide that once a copy of the removal petition is filed with the clerk of the state court, the "State court shall proceed no further unless and until the case is remanded." 28 U. S. C. § 1446 (e).

¹³ See *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578. The Act of 1851, 9 Stat. 635, as amended, provides that once a shipowner has deposited with the court an amount equal to the value of his interest in the ship, "all claims and proceedings against the owner with respect to the matter in question shall cease." 46 U. S. C. § 185.

¹⁴ See *Treinies v. Sunshine Mining Co.*, 308 U. S. 66. The Interpleader Act of 1926, 44 Stat. 416, as currently written provides that in "any civil action of interpleader . . . a district court may . . . enter its order restraining [all claimants] . . . from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action." 28 U. S. C. § 2361.

¹⁵ See *Kalb v. Feuerstein*, 308 U. S. 433. The Frazier-Lemke Farm-Mortgage Act, as amended in 1935, 49 Stat. 944, provides that in situations to which it is applicable a federal court shall "stay all

tion governing federal habeas corpus proceedings,¹⁶ and (6) legislation providing for control of prices.¹⁷

In addition to the exceptions to the anti-injunction statute found to be embodied in these various Acts of Congress, the Court recognized other "implied" exceptions to the blanket prohibition of the anti-injunction statute. One was an "*in rem*" exception, allowing a federal court to enjoin a state court proceeding in order to protect its jurisdiction of a *res* over which it had first acquired jurisdiction.¹⁸ Another was a "relitigation" exception, permitting a federal court to enjoin relitigation in a state court of issues already decided in federal litigation.¹⁹ Still a third exception, more recently developed, permits a federal injunction of state

judicial or official proceedings in any court." 11 U. S. C. § 203 (s) (2) (1940 ed.).

¹⁶ See *Ex parte Royall*, 117 U. S. 241, 248-249. The Federal Habeas Corpus Act provides that a federal court before which a habeas corpus proceeding is pending may "stay any proceeding against the person detained in any State Court . . . for any matter involved in the habeas corpus proceeding." 28 U. S. C. § 2251.

¹⁷ Section 205 (a) of the Emergency Price Control Act of 1942, 56 Stat. 33, provided that the Price Administrator could request a federal district court to enjoin acts that violated or threatened to violate the Act. In *Porter v. Dicken*, 328 U. S. 252, we held that this authority was broad enough to justify an injunction to restrain state court proceedings. *Id.*, at 255. The Emergency Price Control Act was thus considered a congressionally authorized exception to the anti-injunction statute. *Ibid.*; see also *Bowles v. Willingham*, 321 U. S. 503. Section 205 (a) expired in 1947. Act of July 25, 1946, 60 Stat. 664.

¹⁸ See, e. g., *Toucey v. New York Life Ins. Co.*, 314 U. S., at 135-136; *Freeman v. Howe*, 24 How. 450; *Kline v. Burke Construction Co.*, 260 U. S. 226.

¹⁹ See, e. g., *Toucey*, *supra*, at 137-141; *Dial v. Reynolds*, 96 U. S. 340; *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356. See generally 1A J. Moore, Federal Practice 2302-2311 (1965).

court proceedings when the plaintiff in the federal court is the United States itself, or a federal agency asserting "superior federal interests."²⁰

In *Toucey v. N. Y. Life Ins. Co.*, 314 U. S. 118, the Court in 1941 issued an opinion casting considerable doubt upon the approach to the anti-injunction statute reflected in its previous decisions. The Court's opinion expressly disavowed the "relitigation" exception to the statute, and emphasized generally the importance of recognizing the statute's basic directive "of hands off" by the federal courts in the use of the injunction to stay litigation in a state court." 314 U.S., at 132. The congressional response to *Toucey* was the enactment in 1948 of the anti-injunction statute in its present form in 28 U. S. C. § 2283, which, as the Reviser's Note makes evident, served not only to overrule the specific holding of *Toucey*,²¹ but to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision."²²

We proceed, then, upon the understanding that in determining whether § 1983 comes within the "expressly authorized" exception of the anti-injunction statute, the

²⁰ *Leiter Minerals Inc. v. United States*, 352 U. S. 220; *NLRB v. Nash-Finch Co.*, 404 U. S. 138.

²¹ The Reviser's Note states in part: "The exceptions specifically include the words 'to protect or effectuate its judgments,' for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See *Toucey v. New York Life Insurance Co.*, . . . 314 U. S. 118 . . .) A vigorous dissenting opinion [314 U.S. 141] notes that at the time of the 1911 revision of the Judicial Code, the power of the courts, of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and Congress intended no change." H. R. Rep. No. 308, 80th Cong., 1st Sess., A181-182 (1947).

²² *Ibid.*

criteria to be applied are those reflected in the Court's decisions prior to *Toucey*.²³ A review of those decisions makes reasonably clear what the relevant criteria are. In the first place, it is evident that, in order to qualify under the "expressly authorized" exception of the anti-injunction statute, a federal law need not contain an express reference to that statute. As the Court has said, "no prescribed formula is required; an authorization need not expressly refer to § 2283." *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511, 516. Indeed, none of the previously recognized statutory exceptions contains any such reference.²⁴ Secondly, a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception. Three of the six previously recognized statutory exceptions contain no such authorization.²⁵ Thirdly, it is clear that, in order to qualify as an "expressly authorized" exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. This is not

²³ Cf. *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511, 521 (dissenting opinion).

²⁴ See nn. 12, 13, 14, 15, 16, and 17, *supra*.

²⁵ See nn. 12, 13, and 17, *supra*. The federal courts have found that other Acts of Congress that do not refer to § 2283 or to injunctions against state court proceedings nonetheless come within the "expressly authorized" language of the anti-injunction statute. See, e. g., *Walling v. Black Diamond Coal Mining Co.*, 59 F. Supp. 348, 351 (WD Ky.) (the Fair Labor Standards Act); *Okin v. SEC*, 161 F. 2d 978, 980 (CA2) (the Public Utility Holding Company Act); *Dilworth v. Riner*, 343 F. 2d 226, 230 (CA5) (the 1964 Civil Rights Act); *Studebaker Corp. v. Gittlin*, 360 F. 2d 692 (CA2) (the Securities and Exchange Act).

to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute.²⁶ The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding. See *Toucey*, *supra*, at 132-134; *Kline v. Burke Construction Co.*, 260 U. S. 226; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 599; *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 78; *Kalb v. Feuerstein*, 308 U. S. 433; *Bowles v. Willingham*, 321 U. S. 503.

With these criteria in view, we turn to consideration of 42 U. S. C. § 1983.

IV

Section 1983 was originally § 1 of the Civil Rights Act of 1871. 17 Stat. 13. It was "modeled" on § 2 of the Civil Rights Act of 1866, 14 Stat. 27,²⁷ and was enacted for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment." 17 Stat. 13. The predecessor of § 1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment.²⁸ As a result of the

²⁶ Cf. *Baines v. City of Danville*, 337 F. 2d 579 (CA4).

²⁷ See remarks of Representative Shellabarger, chairman of the House Select Committee which drafted the Civil Rights Act of 1871, Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871), and *Lynch v. Household Finance Corp.*, 405 U. S. 538, 545 n. 9.

²⁸ In addition to proposing the Thirteenth, Fourteenth, and Fifteenth Amendments, Congress, from 1866 to 1875 enacted the following civil rights legislation: Act of April 9, 1866, 14 Stat. 27; Act of May 31, 1870, 16 Stat. 140; Act of April 20, 1871, 17 Stat. 13; and Act of March 1, 1875, 18 Stat. 335. In 1875, Congress also

new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece, the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. *Monroe v. Pape*, 365 U. S. 167; *McNeese v. Board of Education*, 373 U. S. 668; *Shelley v. Kraemer*, 334 U. S. 1; *Zwickler v. Koota*, 389 U. S. 241, 245–249; H. Flack, *The Adoption of the Fourteenth Amendment* (1908); J. tenBroek, *The Anti-Slavery Origins of the Fourteenth Amendment* (1951).²⁹ Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.³⁰

passed the general federal-question provision, giving federal courts the power to hear suits arising under Art. III, § 2, of the Constitution. Act of March 3, 1875, 18 Stat. 470. This is the predecessor of 28 U. S. C. § 1331.

²⁹ See generally Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952); Note, 75 Yale L. J. 1007 (1966); F. Frankfurter & J. Landis, *The Business of the Supreme Court* 65 (1928). As one commentator has put it: "That statutory plan [of the Fourteenth Amendment and Acts of Congress to enforce it] did supply the means of vindicating those rights [of person and property] through the instrumentalities of the federal government. . . . It did constitute the federal government the protector of the civil rights" TenBroek, at 185. See also *United States v. Price*, 383 U. S. 787, 801 n. 9; K. Stamp, *The Era of Reconstruction* (1965).

³⁰ As Representative Shellabarger stated, the Civil Rights Act of 1871 "not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871). And as Representative Hoar stated: "The principle danger that menaces us to-day is from the effort within the States to deprive considerable numbers of persons of the civil

It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against state action, . . . whether that action be executive, legislative, or *judicial*." *Ex Parte Virginia*, 100 U. S. 339, 346 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.

As Representative Lowe stated, the "records of the [state] tribunals are searched in vain for evidence of effective redress [of federally secured rights] What less than this [the Civil Rights Act of 1871] will afford an adequate remedy? The Federal Government cannot serve a writ of mandamus upon State Executives or upon State courts to compel them to protect the rights, privileges and immunities of citizens The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." Cong. Globe, 42d Cong., 1st Sess., 374-376 (1871). This view was echoed by Senator Osborn: "If the State courts had proven themselves competent to suppress the local dis-

and equal rights which the General Government is endeavoring to secure to them." *Id.*, at 335.

Although, as originally drafted in 1871, § 1983's predecessor protected rights, privileges, or immunities secured by the Constitution, the provision included by the Congress in the Revised Statutes of 1874 was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well. Rev. Stat. § 1979.

orders, or to maintain law and order, we should not have been called upon to legislate We are driven by existing facts to provide for the several states in the South what they have been unable to fully provide for themselves; i. e., the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts." *Id.*, at 653. And Representative Perry concluded: "Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices . . . all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice." *Id.*, App. 78.³¹

Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state courts' failure to secure federal rights. The debate was not about whether the predecessor of § 1983 extended to actions of state

³¹ Representative Coburn stated: "The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. . . ." Cong. Globe, 42d Cong., 1st Sess., 460 (1871).

See also, Cong. Globe, *supra*, App. 85 (Rep. Bingham); 321 (Rep. Stoughton); 333-334 (Rep. Hoar); 389 (Rep. Elliot); 394 (Rep. Rainey); 429 (Rep. Beatty); App. 68-69 (Rep. Shellabarger); App. 78 (Rep. Perry); 345 (Sen. Sherman); 505 (Sen. Pratt); 577 (Sen. Carpenter); 651 (Sen. Sumner); 653 (Sen. Osborn); App. 255 (Sen. Wilson). Cf. *id.*, at 697 (Sen. Edmunds).

courts, but whether this innovation was necessary or desirable.³²

This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

V

Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, “whether that action be executive, legislative or judicial.” *Ex parte Virginia*, 100 U. S., at 346. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a “suit in equity” as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. *Ex parte Young*, 209 U. S. 123; cf. *Truax v. Raich*, 239 U. S. 33; *Dombrowski v. Pfister*, 380 U. S. 479. For these reasons we conclude that, under the

³² See, e. g., Cong. Globe, 42d Cong., 1st Sess., 361 (Rep. Swann); 385 (Rep. Lewis); 416 (Rep. Biggs); 429 (Rep. McHenry); App. 179 (Rep. Voorhees); 599-600 (Sen. Saulsbury); App. 216 (Sen. Thurman).

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BURGER, C. J., concurring

criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the "expressly authorized" exception of that law.

In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in *Younger v. Harris*, 401 U. S. 37, and its companion cases. They are principles that have been emphasized by this Court many times in the past. *Fenner v. Boykin*, 271 U. S. 240; *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89; *Beal v. Missouri Pac. R. Co.*, 312 U. S. 45; *Watson v. Buck*, 313 U. S. 387; *Williams v. Miller*, 317 U. S. 599; *Douglas v. City of Jeanette*, 319 U. S. 157; *Stefanelli v. Minard*, 342 U. S. 117; *Cameron v. Johnson*, 390 U. S. 611. Today we decide only that the District Court in this case was in error in holding that, because of the anti-injunction statute, it was absolutely without power in this § 1983 action to enjoin a proceeding pending in a state court under any circumstances whatsoever.

The judgment is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN join, concurring.

I concur in the opinion of the Court and add a few words to emphasize what the Court is and is not deciding today as I read the opinion. The Court holds

only that 28 U. S. C. § 2283, which is an absolute bar to injunctions against state court proceedings in most suits, does not apply to a suit brought under 42 U. S. C. § 1983 seeking an injunction of state proceedings. But, as the Court's opinion has noted, it does nothing to "question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Ante*, at 243. In the context of pending state *criminal* proceedings, we held in *Younger v. Harris*, 401 U. S. 37 (1971), that these principles allow a federal court properly to issue an injunction in only a narrow class of circumstances. We have not yet reached or decided exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state *civil* proceedings. Therefore, on remand in this case, it seems to me the District Court, before reaching a decision on the merits of appellant's claim, should properly consider whether general notions of equity or principles of federalism, similar to those invoked in *Younger*, prevent the issuance of an injunction against the state "nuisance abatement" proceedings in the circumstances of this case.

